

THE
PRACTICE
OF THE
COURTS
OF
King's Bench and Common Pleas.

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IN TWO VOLUMES.
VOL. II.

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P R E F A C E.

THE remainder of this Work, which hath been so long promised, is at length presented to the Profession. In the former Volume the Editor hath treated of the method of conducting a suit from its commencement to execution, in all *common personal actions*, where the final judgment of the court is obtained, either upon *demurrer*, or after a *nonsuit* or *verdict*. But it often happens that issue is joined on the existence of some matter of *record*, which is to be tried, not by a jury, but by the *record* itself: frequently too, one of the parties checks the progress of the cause, either by suffering judgment by *default*, or *confessing* the action, and thereby the proceedings are diverted into a different channel. There are also certain peculiarities of proceeding attached to certain actions, otherwise *common in their nature*, occasioned by the situation or character of the parties to the suit: such are actions against *peers*, *members of parliament*, by or against *attornies*, against *prisoners*, and the like. Again, other actions have particular proceedings belonging to them, not on account of any singularity in the situation of the parties, but from the *peculiar nature of the action* itself: such as *Ejectment*, *Replevin*, and *Scire facias*; amongst which also may be

reckoned *real actions*. There are lastly, various heads of practice, generally applicable to all cases, and to which it is often necessary to resort, as *Arbitration, Habeas Corpus, Outlawry, Prohibition, Discontinuance, Error, Costs, Amendments and Jeofails*. The different modes of proceeding in all the above cases, form the contents of the following sheets.

It hath been before observed, in the Preface to the first Volume, that notwithstanding the plan, arrangement, and complexion of the present work materially differ from that published by the late Mr. Crompton; yet the Editor, in order to avoid any possible imputation of infringing upon literary property, purchased the copyright of that work. This he thinks proper here to repeat, because it will be found in the course of this Volume, that the Editor has availed himself of some of those materials with which he was thereby furnished; particularly in the proceedings in *real actions*, and the like, wherein the ancient practice hath been but little affected by modern decisions, and which therefore could admit of no great addition or alteration. He hath also incorporated into the body of the Work, or added by way of Notes in the *Appendix*, the chief part of the justly esteemed *Introduction* to Mr. Crompton's Book of Practice.

In truth, the Editor felt this a duty which he owed to the Public, the performance of which cannot stand in need of an apology; for as he was about to introduce this work as a substitute for Mr. Crompton's, he conceived that the least he could
do

P R E F A C E.

do was, not to give the Profession just cause of lamenting the exchange, by depriving them of any part of *that* work which might be deemed useful and improving. The Editor is anxious to make this public acknowledgment, as he scorns even to entertain a wish, much more to make an attempt, to gain credit to himself for that which does not justly belong to him. Rather would he endure the severest censure of criticism, than the painful consciousness of unmerited approbation.

LINCOLN'S-INN,
March 14, 1796.

B. J. S.



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A P P E N .

APPENDIX:

Consisting of various Notes on the History and Jurisdiction of the Courts; on the Law of Arrests, the Origin of Bail in Civil Actions, and the Forms of Writs and other Proceedings

Page 589—735

A
D I G E S T
OF THE
RULES and CASES of Practice

IN THE COURTS OF
King's Bench and Common Pleas.

C H A P. XIII.

Of Trial by Record.

THE proceedings in common personal actions brought by and against common persons, where the parties either join in demurrer in order to obtain the judgment of the Court upon some point of law, or come to issue upon some fact to be tried by a jury, have been already considered in the former volume; but it often happens in the course of the proceedings, that some matter of record, as a fine, judgment, act of parliament, or the like, is pleaded by the one side, the existence of which is denied by the other: issue is then joined upon the plea or replication, as it may happen, of *nul tiel record*, which is tried not by any witnesses or jury, but merely by the record itself.

Various are the matters of record that are pleadable and to be thus tried by the record; as titles of nobility, whether earl or no earl, baron or no baron, shall be tried by the king's writ or patent only, which is matter of record. 6 Rep. 53. So in the case of an alien, whether alien friend or enemy, shall be tried by the league or treaty between his sovereign and ours, for every league or treaty is of record. 9 Rep. 31. Also whether a manor be held in ancient demesne or

Various matters
of record plead-
able.

not, shall be tried by the record of Doomsday in the king's Exchequer. Thus also upon the plea of a former judgment recovered by the plaintiff against the defendant for the same cause of action, or of another action depending for the same cause, or of outlawry, or of *comperuit ad diem* to a bail bond, or of any act of parliament, or, in short, of any other matter of record, the general replication is *nul tiel record*, upon which the parties join issue, and the truth or falsehood of such issue is determined by the party producing or failing to produce the record in question, on a day given him for that purpose.

To a misrecital of an act *nul tiel record* proper.

If a private act of parliament be misrecited, the adverse party cannot demur, but must plead *nul tiel record*. 3 Sal. 296.

The record may be of the same or different court.

The record to be produced may be a record of the same court, or of a different court to that in which the trial is to be had.

Form of replication in both cases.

If it be of the *same* court, the replication of *nul tiel record* should conclude with giving a day for defendant to bring it in, because the issue is always in such case complete without a rejoinder; but if it be of *another* court, the replication may either conclude in the same way, and so render the issue complete, or with an averment, and prayer of debt or damages, which will compel the defendant to rejoin, "that there is such a record," for where the record is of another court, the replication is good either way. *Sandford v. Rogers*, 2 Wil. 13. *Newberry v. Strudwick*, Bar. 335.

What day should be given.

If the proceedings be by original, a general return day should be given to bring in the record. If by bill, a day certain.

Plea need not be signed.

The plea of *nul tiel record* need not be signed in C. B. *Herbert v. Ld. Weymouth*, Blac. 816.

How defendant called to produce the record, and the consequence of failing therein.

Where the proceeding is by original, and a general return day is given to bring in the record, the defendant ought to be called to bring in the record at the rising of the court that day, and if he fail, the rule for judgment should be "unless cause on the appearance day of that

that general return," and the record may be brought in on that or any intervening day; but where the proceeding is by bill, and the day given to bring in the record is a day certain, the record cannot be brought in after that day, but on that day at the rising of the court, defendant ought to be called to bring in the record, and if he fail, the court will appoint the day to be inserted in the rule for judgment *nisi causa*. *Hopkins v. Knapp*, Bar. 264. *Calverac v. Pinkero*, Bar. 84. 343.

If the judgment upon the issue of *nul tiel record* be final, the rule, on failure of producing the record, should be for judgment, *unless cause within four days*, that defendant may have the usual time to move in arrest of judgment; but where the judgment is interlocutory, it may be a *shorter* time, because the reason fails, as defendant may move in arrest of judgment after execution of inquiry, the rule for judgment in such case not being given till the return of inquiry. *Hopkins v. Knapp*, Bar. 264.

How, if judgment be final or interlocutory.

But in case the judgment or record pleaded be of the *same* court, there is a much more summary way of proceeding, for upon demand made, the party so pleading the same, must give the attorney for the adverse party a note in writing of the term and number roll whereon such judgment or matter of record is entered and filed, and in default thereof, such plea is not to be received. Imp. C. B. 345. Carth. 453. Tidd, K. B. 481.

If record of *same* court, it must be produced on oyer or demand.

And this whether the plea be in abatement or bar. *It*.

If the matter of record pleaded be only pleaded in abatement, the judgment on failure of producing the record is not peremptory, but *respondens ouster*. Ld. Ray. 550.

Judgment when peremptory or not.

But if it be pleaded in bar, it is then judgment absolutely, Cro. Car. 566. and it is either final or interlocutory according to the nature of the action.

When final or interlocutory.

Where a record itself is shewn to the court in pleading, the defendant cannot say *nul tiel record*, for by the *profert*

Nul tiel record bad, if profert made thereof in pleading.

profert in curia it appears to the court that there is such a record. Co. Lit. 260. Hard. 158.

So if matter of record be mixed with matter of fact.

If the matter of record be mixed with matter of fact, and the matter of fact is put in issue as well as the matter of record, the issue should conclude to the country, and the trial be by a jury; if only the matter of record be in issue, the conclusion should be to the record. *Esplin v. Smallet*, Say. 208. *Whitmore v. Rooke*, *Ib.* 299.

If record produced, how it operates as an estoppel.

If upon an issue of *nul tiel record* of a judgment the record is produced, the party and all that claim under him are estopped to say there is no such judgment, for it is entered upon the roll, *quod habetur tale recordum*, and the party cannot say that this was not the judgment against him, but that it was another judgment. *Ld. Ray.* 1050. *Treviban v. Lawrence*.

If the record be of another court, it must be produced by *certiorari* and *mittimus*.

Where the record pleaded is a record of another court, the only way of producing it is, by suing out a *certiorari* from the court of chancery for such court where the record is, to certify the record, and upon the return of *certiorari*, but not till then, the record will be sent by *mittimus* to the court where it is to be produced.

Thus, if in the Common Pleas a record of the King's Bench be pleaded, although in general it is said the records of the King's Bench shall not be moved into any other court, by this means they may be removed. *Cro. Car.* 297. *Luttrell v. Lea*, 2 Saund. 344.

It may be supposed that although this formal way of proceeding might be necessary where an inferior court requires a record to be produced from a superior court, yet that a more summary way might be adopted by a superior court who has jurisdiction over an inferior, to get a record required from the latter.

Court of K. B. will not interfere in a summary way.

But where an attempt of that kind was made by motion in the King's Bench, for an order upon the proper officer of the court of Common Pleas to attend there with the record of that court, that it might be inspected, upon the ground of saving time and expence, and of the

the general jurisdiction of the King's Bench over inferior courts; *Ld. Mansfield* and the other judges refused, saying it would be wrong to go out of the established rules and methods of proceeding. *Hewson v. Brown*, Bur. 1034.

If the record be in a county palatine there shall be a writ to the chamberlain to certify. Clift. 148. If in an inferior court, to the proper officer, and if he refuses, there shall be a rule to do it upon pain; and then if he does not certify, an attachment shall go. Palm. 562.

So if record be of co. pal.;

or of inferior court; attachment if officers refuse to certify.

In these cases, if the inferior court certify the tenor of the record it is sufficient. 3 Sal. 296.

To certify tenor of record sufficient.

How to proceed when the other side is to produce Record.

K. B.

When the parties join in issue upon nul tiel record, the paper book having been made up by clerk of papers and returned by the other side, get the master to mark on paper book, "a rule to produce the record;" it is a four-day rule, and is to be entered with clerk of rules; serve copy on the attorney of the other side; get a roll; enter all the proceedings regularly thereon; docket it, and carry it to Treasury Chamber to be filed; attend at Westminster on the day given by the rule for record to be produced; bespeak the roll at the treasury to be brought into court; give paper book to one of the criers, who will call defendant to produce the record, or he will be condemned. If he does not produce it, secondary will mark on roll that he hath not produced the record; this is signing the judgment.

If

C. B.

In this court the issue of nul tiel record, as all others, is made up by the attorney himself.

Enter the whole issue on the roll, and file warrants of attorney; take roll to prothonotary and docket it; leave it with clerk of dockets, who will carry it to Westminster on the day mentioned in plea for record to be produced; party will be called by him to produce same; if he fails, draw up at night rule with secretary.

If the judgment be final, such rule is a four day rule, at the expiration of which, secondary certifies on the rule that no cause has been shewn; which certificate must be produced to the prothonotary when judgment is signed, which is to be on a double half crown; tax costs and sue out execution; but if the judgment be interlocutory,

B 3

enter

If the judgment be interlocutory, give notice of inquiry, and proceed to execution.

If final, a four day rule for judgment must be given; sign judgment on a double half crown stamp paper; get costs taxed, and proceed to execution.

enter incipitur of declaration, &c. on treble penny; carry it to prothonotary, who will sign interlocutory judgment; then proceed to execute inquiry, provided notice has been already given, if not, give notice, though notice of inquiry may be given on delivery of issue, thus, "in case judgment be given for plaintiff, a writ of inquiry will be executed on such a day." Long v. Lingwood, P. R. 443.

Upon completing the issue you may give the day yourself for producing the record in the replication, provided it be four days after delivery of issue.

If the action be by original, it should be on a general return; if by bill, on a day certain. Imp. C. B. 342.

How when the Record is to be produced by yourself.

*If, having declared upon a judgment, you intend to produce it on the issue of *nul tiel record*, get the roll of such judgment ready filed in the treasury, and having entered all proceedings and docketed your roll as above, get one of the criers to bring the record of such judgment into court, which being read and compared with the issue by secondary, you may in the evening get a four day rule for judgment and proceed as above; so if it be a record produced by defendant, judgment will be entered that he has *perfected* the record.*

C H A P. XIV.

HITHERTO we have confined ourselves to the proceedings in an action when the parties go regularly on to final judgment and execution without *default* on either side; but it frequently happens that the cause is checked in its progress, and its course diverted by some omission or negligence on the one side or the other, or put an end to by some compromise or settlement between the parties.

As the ends of justice would be defeated if it were in the power of either party, by his own negligence or misconduct, to prevent his adversary from bringing the suit to a conclusion, it is therefore wisely established by the usage and practice of the courts, that if the defendant or plaintiff, either from dilatoriness or negligence, omit to take with due expedition such steps as are required of them, the other party may still pursue his remedy by signing judgment against the defaulter, and recovering the debt, damages, or costs, to which he may be entitled.

If this neglect be on the part of defendant, it is called judgment by *default*, though perhaps it may be voluntary; for when a defendant is conscious that he has no merits, and that he must eventually have a verdict against him should he proceed to trial, it is prudent to suffer judgment by default, the costs being thereby considerably diminished.

If the plaintiff be guilty of a default in not prosecuting his suit, the defendant is then entitled to judgment against him, to recover those costs which he may have been put to in the action, and this is called judgment of *non pros*.

But in both these cases the neglect must be before issue joined; for whenever issue is joined between the parties, the plaintiff then may by himself proceed to trial by making up the record, giving notice of trial, and the

like; and if the defendant does not appear when the cause is called on, a verdict must be given for the plaintiff; and if after issue is joined the plaintiff does not proceed to trial as he ought, the defendant cannot sign judgment by default, nor can he (except in a few particular cases) carry down the record himself to trial, but he must move the court for leave to enter up judgment against the plaintiff, which is called judgment as in case of a nonsuit.

Independent of these judgments grounded upon the default or neglect of the parties, it often happens, that the defendant *confesses* the plaintiff's action, and agrees that such confession should be entered upon the proceedings, or that he gives a bond conditioned to pay the debt by instalments, or the like, with a warrant of attorney, which is an authority to enter up judgment against him, provided the condition of the bond be not fulfilled; these judgments are called judgments by *confession*, and judgment on *warrant of attorney*.

The proceedings in each of these cases shall be severally treated of in the following chapter: first, of such judgments as are signed or entered up *against* the defendant, namely by *default*, by *confession*, or *warrant of attorney*; and lastly, of such judgments as are obtained by defendant from the default of the plaintiff, which are judgments of *non pros* and judgment *as in case of a nonsuit*.

SEC. 1. Of Judgment by Default.

SEC. 2. Of Judgment by Confession.

SEC. 3. Of Judgment on Warrant of Attorney.

SEC. 4. Of Judgment of Non-pros.

SEC. 5. Of Judgment as in case of a Nonsuit.

SECTION I.

Of Judgment by Default.

How to sign Judgment by Default.

K. B.

Get a roll from K. B. office, enter thereon the warrants of attorney and memorandum of declaration, which is sometimes called making an incipitur on roll; get also a treble penny stamp paper if judgment be interlocutory, and a double 2s. 6d. stamp if final; enter thereon an incipitur of the declaration being merely the memorandum and a few words of declaration; carry judgment paper and roll to clerk of judgment, who will sign same, pay 4d. per sheet, and 8d. filing warrants of attorney.

(For form of warrants of attorney see vol. I. p. 402, and for memorandums, see vol. I. p. 384.)

If judgment be final, get the master in K. B. or prothonotary in C. B. to tax costs, who will mark same on judgment paper, and then sue out execution.

But if judgment be only interlocutory, after having signed judgment as above directed, proceed to sue out and execute writ of inquiry: first give

Notice of Inquiry;

which may be in the following form:

Take notice that a writ of inquiry of damages in this cause will be executed on the day of instant, between the hours of 10 and 12 of the clock in the forenoon of the same day, at the
Dated the
day of 1795.

To Mr. W. H. Attorney for T. S. Plaintiff's Attorney.
defendant.

C. B.

Make incipitur of declaration on same stamp paper as in K. B. and also warrants of attorney on roll; file them with clerk of warrants; pay in debt, trespass, and detinue 4d. in other actions, 8d. each. He marks judgment paper; carry it to the prothonotary with draft of declaration, who will sign judgment; pay him 2s. if declaration of same term and already filed: if not, 8d. per sheet for declaration, and 3s. for judgment by confession and warrant of attorney.

Tours, &c.

If

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If in Middlesex and in term time say, at the King's Arms Tavern, Palace Yard, Westminster, in the county of Middlesex; if in vacation, at the sheriff's office, in Took's Court, Curfitor-street, Chancery-lane, in the county of Middlesex.

If in London, whether term or vacation, at the secondaries office, No. 10, Grocer's Hall Court, London.

If in the country say, will be executed at the house of A. B. commonly called or known by the name or sign of the in street, Cambridge, in the said county.

As to time when notice ought to be given, and what it should contain, and the like; see post, Observations. See also 1st vol. sec. Notice of Trial.

Of countermanding and continuing Notice.

This notice may be countermanded if any thing should prevent execution of inquiry; notice of countermand must be given according as the notice of trial was; if eight days notice of trial, two days notice of countermand is sufficient; but if fourteen days notice of trial, then six days notice of countermand. Imp. Prac. B. R. 402. C. B. 457.

So notice of executing inquiry may be continued to another day upon giving notice of such continuance two days before execution.

Of the Writ of Inquiry, making it out and executing it.

The writ of inquiry is to be engrossed on a 2s. 6d. stamp parchment in B. R. not to be signed, neither by bill nor original; sealing 7d. In C. B. to be signed by the prothonotary; pay 1s. 4d. for first count, and 8d. every other; or 8d. for first sheet, and 4d. every other; sealing 7d. Indorse thereon the day for which you have given notice of execution; carry it to the sheriff's office two days before you execute it in B. R. and one day in C. B. R. Hil. 23 Geo. 3. and he will cause a jury to be returned. If you think the attendance of any witnesses necessary at the execution, sue out subpoenas as in cases of trial; pay in London 1l. 9s. 4d. and for every witness 4d. In Middlesex, 1l. 10s. 4d.; other counties 1l. 11s. 6d. Attend at the day of execution.

Of subpoenaing Witnesses.

Witnesses may be subpoena'd, if they will not voluntarily attend; blank forms may be had at the stationers, and four may be put in one subpoena.

SEC. I.] JUDGMENT BY DEFAULT.

It must be engrossed on a 2s. 6d. stamp, signed and sealed, and each witness served with a copy and paid 1s.

In B. R. a præcipe for subpoena must be made out for the office, but no occasion for it in C. B.

If you wish to attend by counsel, give notice accordingly to the other side.

When writ is returnable, call for it at the sheriff's office, who will return it with inquisition thereon.

Of final Judgment.

B. R.

On the Day of Return.

Give a rule for judgment on inquisition at the clerk of the rules, pay 1s. 10d. it is a four day (a) rule, exclusive of the day it is given; and Sunday or holiday intervening is not reckoned. Give it in same manner as rule to plead: if no motion to set aside inquisition, or to arrest the judgment; when rule expires proceed to final judgment on inquisition, as in case of postea.

Rule not to be given till writ returnable.

C. B.

No rule necessary; but having waited (a) four days after return of inquiry, proceed to final judgment on inquisition as upon postea.

Of executing Inquiry before a Judge.

Upon particular occasions it is advisable to execute inquiry before a judge; application is made to the court upon affidavit, stating the circumstances of plaintiff and defendant, and nature of the action; it is a rule to shew cause, and if made absolute, a rule is drawn up for sheriff to summon a good jury. A common writ of inquiry is made out, directed to the sheriff, and notice is given for the sittings or assizes generally, and not for any particular day. Writ with the rule is sent to sheriff; enter the cause

(a) Within these four days, defendant may move to set aside inquisition, or in arrest of judgment.

with

JUDGMENT BY DEFAULT. [Ch. XIV.

with the marshal as if it were a record, same fees paid, and afterwards sheriff returns inquisition and has his usual fees; proceed to final judgment on return of inquisition as above directed.

In vacation this may be done by an order of judge for such rule to be drawn by clerk of rules, upon a common motion paper signed by counsel being carried to him.

This indulgence is not merely confined to cases where any matter of law is likely to arise in the course of the inquiry, as is said in a late book of practice, Tidd, 319. but also where the facts are important. I have known it in an action for breach of promise of marriage where no point of law was likely to arise.

OBSERVATIONS.

A. The Effect of a Judgment by Default, in what Cases Plaintiff entitled to it, and how and when to be set aside.

B. Of the Writ of Inquiry.

(B. 1.) In what Cases Writ of Inquiry is requisite, &c.

(B. 2.) Of the Notice of Inquiry, when to be given, what it should contain, how served, continued, and countermanded, &c.

(B. 3.) Of the Execution of Inquiry, by and before whom; of the Province of the Sheriff and Jury; of the Evidence and Verdict; of adjourning the Execution; of altering and returning Writ, and Defendant's Costs for not executing it.

C. Of setting aside Inquisition, arresting the Judgment, and amending the Writ and Proceedings.

3. A. Of the Effect of Judgment by Default, &c.

Effect of judgment by default. It was formerly held that defendant was out of court by his default, and that to all purposes, except final judgment being given against him; so that if after a default

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default at the trial and inquest had thereon, the issue was found immaterial, no repleader could be awarded. *Staple v. Hayden*, Salk. 216. Nor could defendant enter a suggestion on the roll, where plaintiff in an assumpsit only recovered 22s. damages. *Brampton v. Crabb*, Str. 46. In like manner where plaintiff was nonsuited, he used to be held out of court for all purposes, but that of having judgment signed against him; but it has been long since the practice of the courts to set aside nonsuits where the justice of the case requires it; so have they relaxed with respect to defendant, by considering him in court to many purposes, though judgment has been by default. *Barnay v. Tubb*, 2 H. Blac. 356.

By the practice of the courts there are certain stated times in which the defendant must proceed by pleading, rejoining, or the like, according as the stage of the cause may be, and which if he neglects to do, plaintiff may avail himself of the default and sign judgment; the cases therefore in which plaintiff is entitled to judgment by default are as numerous and various as the defaults of which the defendant may be guilty. To know whether plaintiff is justified in signing judgment by default, refer to such chapter and section of the former or present volume as treats of that part of the proceedings (whether pleading, or rejoining, or the like) in which it is conceived defendant has been guilty of any laches, and on account of which plaintiff thinks himself entitled to sign judgment.

In what cases judgment by default may be signed.

But there is one rule of court made since the publication of the first volume that affects the present subject, which orders, "That no judgment shall be signed for non-payment of issue money, but that the issue money shall remain to be taxed as part of the costs in the cause;" this is the rule in all the courts. R. Hil. 35 G. 3. 6 D. & E. 218. So that the practice, as laid down in vol. I. ch. 9. sec. 1. B. upon this point, and the cases relating thereto, are now obsolete.

Not allowed for non-payment of issue money.

If judgment by default be irregularly signed, court on motion will set it aside; but defendant must be cautious to apply in time, and not do any thing which may be construed into a waiver of the irregularity.

When judgment by default will be set aside for irregularity.

In

In general it is said that this application must be made two days before enquiry executed, and if the irregularity be in the notice subscribed to process, it must be made before judgment signed. *Grimes v. Cleaver*, Bar. 255.

When defendant should apply to the court.

But perhaps the best rule may be to apply in the first instance, and so use all diligence to get the error rectified by the court.

In a joint action, judgment by default, one of the defendants had no notice of writ or declaration; after inquiry executed on motion to set aside proceedings, it was urged it came too late, but *per Cur.* the judgment can never be good as to him that was not served, and as the judgment is joint, it must be set aside as against all the defendants. *Coulson v. Turnbull* and others, Prac. Reg. 237. Bar. 246.

When on payment of costs, though no irregularity.

But if judgment by default be regularly signed, court will, any time before inquiry executed, set it aside upon terms, on defendant's paying the costs and pleading issuable to such action *instantly*. *Cavil v. Burneford* and others, Burr. 568, and if required, taking short notice of trial, *Matthews v. Stone*, Bar. 242, or bringing the money into court, &c. *Welland v. Rock*, Bar. 243.

But this is only where defendant pleads to the merits, not to give him the advantage of any nicety or informality in pleading, by letting him in on a demurrer. *Forbes v. Ld. Middleton*, Str. 1242.

Or upon the plea of the statute of limitation. *Willit v. Atterton*, 1 Blac. 35.

Or where it contains special matter that is questionable, and designed to draw plaintiff to demur. *Wood v. Cleveland*, Sal. 518.

It is said such regular judgment will only be set aside on payment of costs when plaintiff has not lost a trial. *Siffed v. Lee*, Sal. 402.

But held otherwise in *Prudhoe v. Armstrong*, Bar. 256.

13. Of the Writ of Inquiry.

23.

(B. 1.) *When Writ of Inquiry is requisite.*

When judgment is obtained by default, if the action be in debt, covenant, or the like, (*The Russell v. Fletcher*, Doug. 315.) to recover any fixed specified sum, and there is no occasion for the interference of a jury to ascertain the amount of plaintiff's demand, it is then a final judgment, and plaintiff may proceed immediately to get his costs taxed, and sue out execution as before directed, p. 11. But if the action be in assumpsit, or case, or covenant, or the like, to recover any unliquidated debt, or uncertain damages for an injury sustained, it is then called interlocutory judgment, it being necessary, before such judgment can be finally entered up, to take some further step in order to get such debt or damages liquidated and assessed; this is done by suing out a writ of inquiry directed to the sheriff, who summons a jury for that purpose. See *ante*, p. 9, 10.

But a writ of inquiry is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages. *Bruce v. Rawlins*, 3 Wil. 61. Doug. 316, n.

Thus of late years, in certain cases, they have assessed damages which were formerly assessed by a jury on writ of inquiry.

In actions on bills of exchange and promissory notes, the courts now allow the plaintiff, after judgment by default, to refer it to the master or prothonotary to compute what is due for principal and interest; it is a rule to shew cause, but is granted of course in all ordinary cases. *Rasleigh v. Salmon*, 1 H. Blac. 252. *Andrews v. Blake*, lb. 529. *Longman v. Fenn*, lb. 541. *Shepherd v. Carter*, 4 D. & E. 275.

If, however, there be any particular circumstances in the case, or any thing that renders the calculation of what may be due uncertain, this rule will not be granted; as if the bill of exchange be for so much foreign money,

When in actions on bills of exchange, &c.

Judgment by default, final or interlocutory.

In what cases writ of inquiry necessary.

the

the value of foreign money being uncertain. *Maunfell v. Ld. Massarene*, 5 D. & E. 87.

The courts are cautious not to extend this practice too far, and refused the rules after judgment by default, in an action of *assumpsit* on a foreign judgment. *Messin v. Ld. Massarene*, 4 D. & E. 493.

Of the writ of inquiry when jury has omitted to assess damages at the trial.

Although at present we are treating of the writ of inquiry in cases of judgment by default, yet it may be proper to observe, that writs of inquiry sometimes issue even after trial and verdict, where the jury have omitted to assess the damages of plaintiff.

In cases of demurrer upon evidence.

If upon the trial there is a demurrer to evidence, and the parties join in demurrer, the jury may either at the time assess damages conditionally, in case plaintiff has judgment on the demurrer, or they may be discharged, (which is the usual way,) and after the demurrer is determined plaintiff may have a writ of inquiry to assess the damages. *Darrose v. Newbott*, Cro. Car. 143.

When the inquiry of damages is ordered by any particular statute, and jury have omitted to assess them.

In many cases acts of parliament direct the jury to assess damages, and applications have been frequently made for writs of inquiry to supply their omission: the granting of which depends upon the nature of the jury's inquiry and upon the words of the particular statute. If the jury are to inquire of damages as part of their charge; that is, if from the nature of the issue damages are consequent and dependant upon it, then no writ of inquiry can go to supply their omission of assessing damages at the trial; because in case they had found excessive damages, an attaint would lie against them, and therefore, if a writ of inquiry were allowed, the party might be deprived of his remedy by attaint; but where the damages are merely collateral, and not put in charge to the jury, and they are only to inquire thereof as an inquest of office, then their omission so to do may be supplied by a writ of inquiry, because, in such case, had they inquired thereof at the trial, and found excessive damages, no attaint would lie, and therefore the party loses no benefit, for no attaint lies on an inquest of office; this seems to be one leading distinction which pervades all the cases on this point. See *Kynaston v. the Mayor of Shrewsbury*, Cal. Tem. Ld. Hard.

How such statutes to be construed.

Hard. 295. *Valentine & Fawcett*, Ib. 138. *Erihon v. Le Maitre*, 2 Wil. 368. *Bennet v. Hart*, Say. 214. *Cheyney's Case*, 10 Co. 118. *Herbert v. Waters*, Sal. 205.

The other distinction arises from the particular words of the statutes, for although the damages may be a collateral matter of inquiry, yet if the statute restrains such inquiry to any particular jury, no writ of inquiry can supply their omission; such is the 17 C. 2. c. 7. concerning distresses for rent, where the same jury returned to try the issue, must inquire of the arrears of rent, &c. *Herbert v. Waters*, Sal. 205. Whereas by the statute of 43 Eliz. c. 2. f. 19, relating to suits brought against overseers of the poor, for taking distresses for poor rates, it is not confined to the same jury, but a writ of inquiry is also given. *Ib. Valentine v. Fawcett*, Cas. Tem. Ld. Hard. 138. 2 Str. 1021.

If defendant in pleading confesses any part of plaintiff's charge, and denies the residue, and the venue is awarded as well to try the issues joined as to assess plaintiff's damages, and at the trial the verdict is only for plaintiff on the part confessed, but jury neglect to assess damages thereon, a writ of inquiry will be afterwards allowed. *Townsend v. Pool*, Bar. 228.

Where defendant has confessed part of the plaintiff's charge, how damages to be assessed thereon.

So, if the issue be not well joined, and a mis-trial has been had, and thereupon a motion is made in arrest of judgment; yet if the defendant's plea amounts to a confession, though the verdict be void, the court will give judgment upon his confession, and grant a writ of inquiry to ascertain plaintiff's damages. *Lacy v. Reynolds*, Cro. Eliz. 214. *Jones v. Bodines*, Carth. 370. where the form of the special entry on the roll in that case may be seen.

Although judgment be arrested for mis-trial or the like.

Wherever a party binds himself in a penalty for the performance of covenants and an action is brought thereon, the plaintiff must proceed according to the stat. 8 & 9 W. 3. c. 11. f. 8. which is now held to be compulsory; and therefore if defendant lets judgment go by default, plaintiff *must* suggest the breaches upon the roll, and issue a writ of inquiry as therein directed; the jury upon this writ is by the statute to be summoned

How plaintiff to proceed in actions on penalty for non-performance of covenants.

before the justice of assize or *nisi prius*. *Roles v. Rosewell*, 5 D. & E. 538. *Hardy v. Bern*, *Ib.* 636.

Where there is a demurrer and judgment by default, or an issue on such judgment.

Where there is a demurrer to part, and judgment by default as to residue, plaintiff may either proceed with demurrer first, or may sue out his writ of inquiry, and assess contingent damages in case judgment should be for him on the demurrer; but if there is an issue of fact, as *non assumpsit* to the whole, and also another plea of *non assumpsit infra sex annos*, to which an original is replied and issue on *nul tiel record* thereon found for plaintiff, he cannot execute inquiry thereon till he has tried the first issue of *non assumpsit*. *Prior v. Isley*, Bar. 229.

Or issues in law and fact.

So, if there be a demurrer to one count, and an issue on the other, plaintiff may carry down the issue to trial first, and sue out a *venire tam* to try the issue *quam* to inquire of the damages on demurrer, and in that case, the jury gives contingent damages, or he may waive the issues in fact and take out inquiry upon judgment when obtained on demurrer, but in entering final judgment he must enter a *non pros* on the roll as to the issues in fact, or it will be error. *Fleming v. Langton*, Str. 532.

But if in the first case, on trial of the issue plaintiff be nonsuited, no contingent damages shall be assessed. *Snow v. Como*, *Ib.* 507.

Or some defendants plead and others suffer judgment.

So, if in a joint action of trespass, three plead, and three let judgment go, the *venire* may issue *tam ad triandum quam ad inquirendum*, and the same jury at the trial will assess the damages against the defaulters, and this though the three who pleaded should be acquitted. *Jones v. Harris*, Str. 1108. For further observations on this head, see vol. I. ch. 8. C.

(B. 2.) Of the Notice of Inquiry.

What notice necessary.

If the venue be in London or Middlesex, and defendant lives within 40 miles of London, eight days, but if he lives above 40 miles from London, fourteen days notice, exclusive, must be given.

In

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In all cases where the writ is executed in the country, eight days notice, exclusive, is sufficient, Mich. 1654. *Milbourn v. Stephenson*, 1 Barn. 110. for the statute 14 Geo. 2. c. 17. which requires ten days notice of trial at the assizes, does not extend to notices of inquiry. Tidd, 320.

Where no proceedings have been had for a year there must be a term's notice, the same as in cases of notice of trial. *Payton v. Burdus*, Str. 1100. See *ante* vol. I. ch. 9. sec. 2.

Two days notice is sufficient when *short* notice only is required. *Butler v. Johnson*, Bar. 301.

The following rules will shew how anxious the courts have been to expedite justice and prevent delay :

Whereas by a rule of this court made in Trinity term in the second year of the reign of his majesty king George, it was ordered ; " That in all cases where the plaintiff concludes *ad patriam*, the defendant's attorney or clerk in court shall be bound to accept of notice of trial upon the back of the pleading, whether the same be delivered to the defendant's attorney or agent, or left in the proper office where the same may be left by the course of the court. And such notice of trial so given or left as aforesaid, shall be as good and effectual as if issue had been actually joined."

Rules of court as to the time from which such notice is to be reckoned.

" And whereas it appears that notwithstanding the said rule, the plaintiffs in divers actions and suits commenced in this court are delayed, for that the defendant's attorneys are not obliged to take the like notice of executing writs of inquiry ;"

It is therefore hereby ordered, That in every cause where the plaintiff concludes *ad patriam*, and giveth notice of trial upon the back of his pleading pursuant to the said rule, if the defendant doth not join issue on such pleading, before the rule be out, that in every such case after judgment obtained, the defendant's attorney shall be obliged to accept notice of executing a writ of inquiry,

Where plaintiff concludes to the country and defendant neglects to join issue.

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inquiry, from the time that notice of trial was given on the back of such pleading as abovefaid.

R. Hil. Term. 6 Geo. 1. 1719.

“ And whereas the above rules have by experience
 “ been found to be of great use and advantage to plain-
 “ tiffs for the more speedy recovery of their just debts;
 “ but no provision being made in cases where defend-
 “ ants *demur* to the plaintiff's declaration, and by that
 “ means give great delays to plaintiffs, because by the
 “ said rules, defendants are not obliged till after judg-
 “ ment obtained to accept of notice of executing a
 “ writ of inquiry ;”

Where defend-
 ant demurs to
 declaration.

Or pleads a di-
 latory plea to
 which plaintiff
 demurs.

It is therefore now ordered by this court, that in all cases where the defendant demurs to the plaintiff's declaration, the defendant's attorney, or clerk in court, shall be obliged to accept of notice of executing the writ of inquiry on the back of such joinder in demurrer. And in case where the defendant pleads such a dilatory plea that the plaintiff is obliged to demur to, that in such a case, the defendant's attorney, or clerk in court, shall be obliged to accept of notice of executing a writ of inquiry on the back of such demurrer.

R. Trin. Term, 10 Geo. 1. 1724.

“ Whereas great delays often happen to plaintiffs
 “ in their suits in this court by reason of demurrers in
 “ law by the defendant's attorney, after the plaintiff
 “ hath tendered the issue to be tried by the country up-
 “ on the plea of the said defendant pleaded, and hath
 “ delivered paper books with notice of trial according
 “ to the course of this court, so that after judgment
 “ obtained by the plaintiff upon such demurrer in law,
 “ there is not sufficient time to give notice of executing
 “ a writ of inquiry of damages within that term in
 “ which the judgment shall be so obtained ;”

Where defend-
 ant strikes out
 similiter and

Therefore it is ordered for the future, that in every case where the plaintiff shall conclude to the country upon the defendant's plea, and shall give notice of trial of the issue upon the paper book as aforefaid ; and thereupon

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thereupon the defendant, to hinder the trial of the issue, shall demur in law to the replication or plea of the plaintiff, and the plaintiff shall join in such demurrer, and thereupon shall obtain judgment; the attorney for the defendant shall be obliged to accept of notice of executing a writ of inquiry of damages from the time of notice of trial given upon the paper book as aforesaid.

demurs to replication.

R. Hil. Term, 8 Geo. 1. 1721.

Where issue is joined upon any special pleading, and the paper book is made up and delivered with notice of trial, if the defendant return the book with a demurrer, having struck out the pleadings subsequent to that to which he demurs, and judgment be given for the plaintiff upon the demurrer, he may by the above rule execute his inquiry, giving only so many days notice thereof, (*i. e.* of the hour and place of executing it,) as would have been sufficient, had such notice been given when the paper book was delivered with notice of trial.

Or returns paper book with demurrer, having struck out any other pleadings.

Notice of executing inquiry should be in writing, and drawn with a sufficient degree of certainty: 1st, As to the time when it is to be executed.

How it should be given and what it should contain.

Some hour should be mentioned. *Gutten v. Hall*, 1 Barn. 139.

What certainty as to time of executing inquiry.

Or it will be bad though defendant said he would make no defence. *Langstaff v. Lamb*, Bar. 293.

The notice should express that the writ will be executed between two certain hours. *Arnold v. Squire*, Say. 181.

If beyond that time, as between 10 and 2, held irregular. *Foster v. Smales*, Bar. 295. *Robinson v. Phillips*, Ib. 296. *Le Marque v. Newman*, Com. 551.

Notice to execute inquiry by 10 o'clock, held bad. *Isom v. Forwen*, Str. 1142.

So at 10, or as soon after as sheriff can attend. *Hannaford v. Holman*, Bar. 295.

C 3

Though

Though a notice to execute writ at 11 was held regular, as it appeared to be executed before 12. *Last v. Denny*, Bar. 302.

How that time is to be adhered to.

But when notice is given for the execution of a writ of inquiry within a certain time, it is never understood that the time is to be scrupulously adhered to. The sheriff may have prior business that may last beyond the hour. If defendant's attorney therefore leave the place immediately after the hour is passed, it will be deemed a trick, and though inquiry should be afterwards executed, it will be held regular. In one case court said the party should have staid an hour after the time mentioned for executing it. *Anon.* 2 Barn. 214. *Williams v. Frith*, Doug. 198.

But the party is expected to attend punctually at the time, for if he be too late and writ be executed, it is his own laches, and cannot be cured, unless it is manifest sheriff began to execute it before the time. *Beet-knife v. Sir Herbert Packington*, 1 Barn. 233.

What certainty as to place of executing inquiry.

2d, The notice should be certain as to place of executing inquiry.

The sign of the house should be mentioned, *Arnolds v. Squire*, Say. 181, and the street; and if more streets of that name than one, it should be particularized, *Le Marque v. Newman*, Com. 551, and the county. *Lower v. Smith*, Bar. 300. Even where the notice was to execute writ at sheriff's office in Northampton, it was held ill; no sign or particular house being mentioned. Com. 551. Bar. 297. So at Westminster, generally, held bad. *Kinch v. Hasine*, Prac. Reg. 447.

What certainty as to the names of the parties.

3d, The notice should be correct also as to the names of the parties. *Nash v. Harrow*, Bar. 310.

Certainty as to time not necessary if writ to be executed before a judge.

If the inquiry is to be executed before a judge, the notice expresses no time, but is general for the sittings or the assizes, as the case may be; the day and hour is left to the judge's discretion.

Rule to execute inquiry before a judge, was made absolute the last day of term, though rule nisi had only been served on that day.

In this case, notice had been previously given to execute writ before the sheriff, afterwards fresh notice was served to execute it before the judge; there were not eight days between the fresh notice and time of executing it, but it was held well; for as it was not executed till after the time for executing it before the sheriff had elapsed, party could not be damnified. *Perry v. Cortisoes*, 2 Barn. 122.

Of such notice after notice given to execute before the sheriff.

If plaintiff appears for defendant and signs judgment for want of a plea, he may give notice of executing inquiry to defendant himself, or leave the same at his last place of abode; but if defendant has appeared by attorney, notice to defendant himself is bad; it must be served on his attorney or his agent. *Mosely v. Sanford*, Bar. 311. and so in general where the attorney or agent is known. *Higgins v. Stewart*, Prac. Reg. 276.

How notice to be served, and on whom.

Notice of executing inquiry in a country cause may either be given to the agent in town or the attorney in the country. *Smith v. Lacock*, Bar. 305. *Tasburn v. Havelock*, Ib. 306.

When to the party, and when to the attorney.

In a joint action notice should be given to both defendants. *Kingdom v. Herne* and another, Prac. Reg. 443.

Notice of executing inquiry may be continued and countermanded in the same way and subject to the same rules as notices of trial, for which, see vol. I. ch. 9. sec. 2.

Of continuing and countermanding the notice.

Notice of continuance must be served two days before execution of writ, and can only be once continued. *Price v. Bambridge*, Bar. 297.

Notice of countermand must be six days, if a country cause, or if a town one and defendant lives above 40 miles from London; but otherwise, two days.

(B. 3.) *Of the Execution of Inquiry, &c.*

Of the execution of the writ in pursuance of the notice.

Due notice having been given, and the writ of inquiry engrossed and prepared as directed *ante* p. 10. it should be left at the sheriff's office the day before the execution; such witnesses as are required, if unwilling to attend, may be compelled by a subpoena, which should be procured for that purpose, and if either party wishes to attend by counsel, notice thereof should be given, or it will not be allowed in costs.

Where and by whom to be executed.

It should be executed in the same county where the *venue* is laid.

Sheriffs or under-sheriffs ought to execute writs of inquiry, and if the latter appoint deputies for that purpose they will be liable to an attachment. *Wallace v. Humes*, Bar. 231.

Unless such deputy be appointed by deputation under the seal of the sheriff's office. *Davis v. Skyllins*, Bar. 232.

But where the writ was directed to the coroners of N. and they verbally appointed a person to execute it; the appointment was held no authority, but court refused to set aside inquisition because defendant attended execution. *Dixon v. Goodman*, Bar. 413.

An inquisition taken before two under-sheriffs extraordinary held bad, the sheriff can only appoint one. *Denny v. Trapnell*, 2 Wil. 378.

If the sworn under-sheriff live in the same town, it ought to be executed before him. *Ib.*

Before what jury.

It should be executed before a proper jury.

The jurymen were debtors taken out of prison, and though the party attended, inquisition was set aside and conduct of sheriff reprimanded; but there is no objection to their being javelin men. *Stainton v. Beadle*, 4 D. & E. 473.

Inquisition set aside because the jury was returned by the attorney for plaintiff. *Baylis v. Lucas*, Cow. 112.

Inquiry executed before fourteen jurors instead of twelve, held good; for it is but an inquest of office whereon no attaint lies. *Chester v. Crawley*, Str. 1159.

Sometimes the writ is executed before a judge, in which case he is only an assistant to the sheriff, and has no judicial power; and if the parties come to an agreement there, the way to make it effectual is to bring it to him to sign, and afterwards move the court to have it made a rule of court. 12 Mod. 610.

Writ of inquiry may be executed on the return day. On what day. *Dyke v. Blackston*, Ld. Ray. 1449.

But not on a Sunday. *Hoyle v. Ld. Cornwallis*, Str. 387.

And if return-day be on Sunday, it is too late to execute it the day after. *Stanton v. Winsb*, Caf. Prac. C. B. 85.

When a defendant suffers judgment to go by default, he admits the cause of action. Wherever the demand is uncertain, as for money had and received, goods sold, or the like, the plaintiff must prove the debt before the jury; but where the amount appears on the face of the record, as upon promissory notes, bills of exchange, or the like, the defendant admits that he is liable to that amount; the note or bill therefore need not be proved, but they ought to be produced on executing writ to see whether or not any part has been paid. *Green v. Hearne*, 3 D. & E. 302.

In calculating interest or damages in general the jury should only allow up to the time of bringing the action, not of executing the writ. *Holde's v. Cornwall*, 1 Barn. 44. *Baker v. Bache*, Ld. Ray. 1382.

Though *Holt C. J.* in action of covenant for not repairing, held that case not to come within the rule, and that jury did right in finding damages for the premises having

having become worse since the action. *Shortridge v. Lamplugh*, *Ld. Ray*. 803.

What damages
should be found.

The jury must find some damages for plaintiff, but even if they find for defendant, plaintiff if he moves to set it aside must pay costs. *Daniel v. Packhurst*, 2 *Barn.* 215. 223.

Though the damages be *small*, the inquisition may stand, and in general the court will not interfere on behalf of plaintiff, except it be obviously unjust, or the jury or sheriff mistook in point of law. *Hayward v. Newton*, *Str.* 940. *Woodford v. Eades*, *Str.* 425. *Burges v. Nightingale*, *Bar.* 230. *Budicome v. Jones*, 1 *Barn.* 107. *Tutton v. Andrews*, *Bar.* 448.

Especially if it be an action for a *tort*. *Mauricet v. Brecknock*, *lb.* 50.

If the damages be excessive, defendant may move the court to set aside inquisition; but it should be a strong case for court to interpose. *Bruce v. Rawlins*, 3 *Wil.* 61. *Yate v. Swain*, *Bar.* 233.

If damages exceed the sum laid in declaration and judgment be entered accordingly, it will be error. *Chevely v. Morris*, *Black.* 1300. *Baker v. Bache*, *Ld. Ray.* 1382.

But plaintiff may enter a *remittitur* for surplus and cure the defect. *Strawn v. Fletcher*, 2 *Barn.* 344.

Of sheriff ad-
mitting improp-
er evidence.

If the sheriff on execution of writ admits improper evidence, the court will set aside inquisition. *Tutton v. Andrews*, *Bar.* 448.

Or if plaintiff produces no evidence and yet jury gives damages. *Hill v. Martin*, 1 *Barn.* 33. *Ellis v. Wall*, *Bar.* 234.

Of the jury se-
vering the da-
mages in joint
actions.

Where two or more defendants suffer judgment by default in an action of trespass, the jury cannot sever the damages and find so much against one and so much against the other. *Onslow v. Orchard*, *Str.* 422

But

But if one demurs and the other suffers judgment, damages may be severed because they have severed in their plea. *Chapman v. House* and others, Str. 1140.

Execution of writ of inquiry may be adjourned after it is entered upon; and it is the duty of the sheriff in particular cases to adjourn, as where any material witnesses on part of plaintiff is unexpectedly absent, or where any witness obstinately refuses to give evidence, or plaintiff is taken by surprise with any new defence to lessen his demand. *Coleman v. Marubey*, Str. 853. *Markham v. Middleton*, Ib. 1259. *Mauricet v. Brecknock*, Ib. 509. *Hall v. Stone*, Ib. 515.

Execution of writ may be adjourned.

But in such cases of adjournment, plaintiff ought to pay the costs.

If a writ of inquiry be altered and re-sealed before the return thereof, and before it has been made use of, and afterwards executed according to due notice, such alteration shall not vitiate it. *Langley v. Bothwright*, Bar. 232.

Of altering writ of inquiry before execution.

If the writ of inquiry be not executed pursuant to notice, the defendant is entitled to his costs in both courts, in the same way as he is, if plaintiff does not proceed to trial according to notice. *Sutton v. Bryan*, K. B. Str. 728. *Kettle v. Bromfall*, C. B. Bar. 230.

Of defendant's costs if inquiry not executed.

The writ of inquiry must be returnable as the original proceedings are, whether on a general return day, or a day certain; but should it be made otherwise, it is not an irregularity, but error, so that no advantage can be taken thereof, by motion to set aside the inquisition. *Elmes v. Tomlinson*, Bar. 230.

Of the return of writ of inquiry.

And even this error is now helped by the statute of jeofails, as it is only held to be a miscontinuance. *Coupland v. Frinlow*, Say. 245.

So, the want of a writ of inquiry after judgment by default, is aided by the 4 & 5 Ann. c. 16. and not error. *Jiles v. Pitt*, Ld. Ray. 1397.

If

But

Of suing out a second writ.

If a second writ of inquiry issue pending the first, and before it is returned and quashed, inquiry thereon will be set aside as irregular. *Bunting v. Teisdale*, Bar. 231.

C.

C. Of setting aside Inquiry, arresting Judgment, and amending the Proceedings.

What to be done on the return of writ.

On the day of the return of inquiry, the plaintiff gives a rule for judgment with the clerk of the rules; it expires in four days; Sunday or any holiday on which the court does not sit is not reckoned. Imp. K. B. 404.

Of moving in arrest of judgment or to set aside inquiry.

Within these four days defendant may move to set aside the inquiry for any irregularity, whether it be in the writ itself, or the notice, or the execution of writ, or the like; but it is to be observed, that the courts will not countenance frivolous objections, that they are anxious to expedite the substantial justice of the case, and always lean against motions made only for delay.

When to be moved.

Motions therefore to set aside the proceedings should be made in the first instance, as soon as the parties are aware of the irregularity and can apply to the court; and if by their subsequent conduct they have done any thing that can be construed as a waiver of the irregularity, it cures it.

How defect cured by party attending.

Thus any defect in the notice or the like, will be cured by the party or his attorney attending the execution of inquiry. *Yate v. Swaine*, Bar. 233.

So, if there be any error on the declaration, if defendant means to move in arrest of judgment, he must not attend execution of inquiry, but must rely on the defect, and move the court that interlocutory judgment be forthwith entered upon the record agreeable to declaration delivered, and the roll be brought in to the proper office, and that defendant may have four days to move in arrest of judgment after the roll is brought in. *Freeland v. Hunt*, 2 Wil. 380.

All applications must be made within 4 days.

Not only the motion in arrest of judgment, or to set aside inquiry, must be made within the four days above-

above-mentioned, but also any application which defendant has to make to the court must be made within that period.

Thus it is too late afterwards to move to enter a suggestion on the record, to save plaintiff costs or the like. *Barney v. Tubb*, 2 H. Blac. 356.

Writ of inquiry executed on the 5th, final judgment may be entered the 9th; and *per Buller J.* even if the writ of inquiry be executed on the last day of the term, plaintiff has a right to sign his judgment as of that term. *Ib.* 356.

When plaintiff may sign final judgment.

A writ of inquiry is amendable, for there is the roll by which it may be amended. God. 78.

Of amending writ of inquiry or the proceedings thereon.

The writ should pursue the declaration; but if any variance, court will give leave to amend by the record on payment of costs. *Condren v. Coubter*, Cas. Tem. Hard. 314.

One of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both; after this, and after a motion to set aside proceedings for irregularity, the court permitted plaintiff to suggest on the roll, the death of the deceased plaintiff, and to amend the *ca. fa.* without paying costs. *Newnham v. Law*, 5 D. & E. 577.

So, rule granted to strike out one of defendants name and make the writ tally with inquisition. *Ingham v. Chiswell* and another, Bar. 15.

In judgment by default the plaintiff is to make up the whole record, but if error is brought for a slip in not making proper entries for the defendant, judgment shall stay till application to amend be made below. *French v. Cornelys*, Blac. 453.

Where writ of inquiry was executed and no judgment entered up, and the writ was afterwards lost, a new writ and inquisition was ordered upon motion to be made out according to the sheriff's notes, and costs to be indorsed by the master, as appeared to have been before

before taxed by the commitment book. *Bean v. Elton*, Str. 1077.

How to proceed if plaintiff in the action becomes bankrupt.

The bankruptcy of plaintiff does not abate the suit; if plaintiff therefore becomes a bankrupt, writ of inquiry may be awarded and executed, and final judgment entered up, and execution sued out in his own name without any *scire facias* by the assignees. *Bibbins v. Mantel*, 2 Wil. 358. 372. *Waugh v. Aussen*, 3 D. & E. 437.

In what cases plaintiff cannot have final judgment against defendants who have suffered.

Although letting judgment go by default, is, generally speaking, a confession of the action, yet in some cases, where a defendant suffers such judgment, and damages are found against him upon execution of inquiry, the plaintiff cannot have execution for such damages, but judgment will be arrested.

In joint actions.

Thus, in all joint actions against two or more defendants, where one pleads and the other lets judgment go by default; if such plea goes to the whole cause of complaint, and be found upon trial for defendant, and the nature of the action be such, that the justification of the one defendant necessarily takes away plaintiff's cause of action against the other; plaintiff shall not reap any benefit from his interlocutory judgment against such other defendant.

Difference between joint actions, on contract and tort.

This is the case in all joint actions against defendants upon any contract, as assumpsit, debt, covenant, and the like, where the demand is joint, and one cannot be convicted without the other; but not so in actions upon a tort, as trespass, or the like, for there one defendant may be guilty and the other not; but even in trespass, if the justification of defendant be of a nature necessarily to destroy plaintiff's cause of action against all, no judgment can be against the other defendant though he is found guilty. *Biggs v. Benger* and another, Ld. Ray. 1372.

Of discontinuing after verdict on inquiry.

After verdict on writ of inquiry, as after verdict upon issue joined, plaintiff cannot by law discontinue without defendant's consent. *Stephens v. Etherick*, Carth. 86.

SECTION II.

Of Judgment by Confession.

It often happens that the defendant, conscious of having no good ground of defence, confesses the action, which not only saves him the additional expence of the further proceedings by writ of inquiry, or the like, which would ultimately fall upon him, but is also frequently an inducement to plaintiff to indulge him with time for payment of the debt, until which time all proceedings are stayed, the defendant agreeing to certain terms on his part, such as not to bring a writ of error or file a bill in equity.

Its meaning.

The form of such Confession may be as follows :

" I confess this action, and that the plaintiff hath sustained damages to the amount of 50l. besides his costs and charges to be taxed by the master (if in B. R. or by prothonotary in C. B.) and no judgment shall be entered up, or execution issued until the day of next, in default of payment of the sum of 25l. being the debt in this action, together with the said costs ; and that no writ of error shall be brought, nor any bill in equity filed ; and that in case the plaintiff shall enter up his judgment in default of payment, he shall be at liberty to levy the said 25l. together with the costs taxed, and also sheriff's poundage and all other incidental charges. As witnesses, &c."

The form thereof in case.

If it be an action of debt, then " I confess the debt in this cause, and that the plaintiff hath sustained damages to the amount of 1s. besides his costs and charges to be taxed (as above) and the debt is agreed to be paid as follows, (stating the days of payment,) and then as above."

In debt.

This confession may be wrote in the margin of the declaration, or on back of inquiry, or on plain paper.

Where to be written.

This confession may be before the plea pleaded, it is then merely a confession of the action, or *cognovit actionem* as it is called ; but if made after plea pleaded, it is then a confession of the action with an agreement

A *cognovit actionem* reliqua verificatione what.

Form thereof.

agreement to withdraw the plea, and is termed a *cognovit actionem relicta verificatione*; it then states, *I hereby consent to withdraw the plea pleaded in this cause, and confess the action, and that the plaintiff hath sustained &c. (as before.)*

If after demurrer, thus, *I hereby consent to withdraw the demurrer, and that the plaintiff take judgment for the debt of* declared on, besides his damages and costs, &c.

How to proceed on a cognovit.

If judgment is to be entered up, sign it on double half crown stamp, as it is final, making *incipitur* on judgment paper; no occasion for new roll; file warrant of attorney if not before done; tax costs and sue out execution.

How if retraxit necessary.

If confession be after plea, a retraxit must be entered, which is done in C. B. by taking judgment paper to prothonotary, who will sign judgment and mark retraxit thereon; but in K. B. defendant's attorney should come in person before the master to withdraw plea. Tidd, 307. Imp. C. B. 465. Ld. Ray. 345.

OBSERVATIONS.

Caution necessary in taking cognovit.

When a *cognovit* is given upon terms, plaintiff should take care that it is expressed as part of the terms, that defendant shall bring no writ of error, or file any bill in equity; for this is not implied, but must be particularly mentioned. *Wade v. Rogers*, Blac. 780.

If no terms be expressed, final judgment may be immediately signed, and execution sued out.

The extent and operation of a cognovit.

A *cognovit actionem*, though after plea pleaded, is, strictly speaking, only an acknowledgment of the count, but the party may confess more if he pleases.

Thus in an action of debt against an executor, he pleaded *plene administravit*; plaintiff replied assets; defendant, *relicta verificatione cognovit actionem*. Judgment was entered for plaintiff, *de bonis testatoris*. It was moved that confession should also contain *he had goods sufficient*, and that it might be added to the entry; but court refused, saying,

saying the confession naturally can extend no further than to the count, which is of the debt, not of the assets; yet if defendant will confess more he may; there are entries both ways. *Bird v. Culmer*, Hob. 178.

So it may be only for *part* of the cause of action, in which case plaintiff can only sign judgment for the part confessed, and must proceed as to residue. How if only for part.

It is clear that where a judgment by confession is given upon terms, if plaintiff proceed contrary to the terms expressed, the court will on motion interpose, because such judgment is in effect rendered only a conditional judgment; but it used to be held that if the *cognovit* were general, and a subsequent and independent agreement was entered into between the parties, restraining its operation, although plaintiff proceeded contrary to such agreement, the court would not interfere upon motion, but put the defendant to his action on the agreement. *Anon. Sal. 400. Tidd, 308.* In what cases court will interfere therein on motion.

But in the case of *Hatton v. Young* in C. B. Blac. 943. the court did take notice of such subsequent agreement, and set aside the judgment as being contrary to good faith and the plaintiff's express undertaking.

A *cognovit* by the principal without notice to the bail does not discharge the bail. *Hodgson v. Nugent*, 5 D. & E. 277. How far it affects bail.

If a *cognovit* be taken from a prisoner, it is proper for an attorney on the part of the defendant to be present, for though in strictness it is not within the rule of 15 Car. 2. (see next Section,) which only relates to defendants in custody of any sheriff or his officer, yet the court will interfere in such case on behalf of a prisoner. *Parkinson v. Caines*, 3 D. & E. 616. What proper when taken from prisoner.

SECTION III.

Of Judgment on Warrant of Attorney.

Another common way of settling a debt is by giving a bond conditioned to pay the amount thereof at a given time, together with a warrant of attorney, authorizing the person named therein to confess judgment for the defendant on failure of performance of such condition.

Thus a security is given to the creditor, whilst the debtor avoids the expence of an action, and is accommodated with time for payment of the debt.

The bond and warrant may be given at any time, either before or after action brought. As it is in constant practice to give these warrants and to enter up judgments thereon, it will be proper to consider,

- A. The Validity of a Warrant of Attorney.
- B. Its Operation and Effect.
- C. The Time and Manner of entering up Judgment thereon.

The validity of the warrant.

The validity of a warrant of attorney depends upon the competency of the parties giving and receiving it, their situation at the time, and the consideration for which it is given.

It must be given by a person competent in law to do such an act.

How if given by an infant.

Thus a warrant of attorney given by an infant is absolutely void; though there may be circumstances of fraud on the part of the infant. *Saunderson v. Thorn*, 1 H. Blac. 75.

Or

Or by a feme covert, except she lived and acted as a feme sole, in which case, court refused to set the warrant aside upon motion, and put her to her writ of error. *Anon. Salk. 400.* By a feme covert.

If an infant join with another in giving such warrant, it is void only as to the infant. *Motteux v. St. John St. Aubyn, 2 Blac. 1133.* If by an infant and another person,

So if a warrant of attorney be given to confess judgment to a feme covert, and it be confessed accordingly, it is void. *Roberts v. Pierfon, 2 Wil. 3.* or to a feme covert.

The situation of the person giving it should be considered; for if the party be in custody at the time, the following rules and cases must be attended to: The situation of the person giving it.

K. B.

No warrant of attorney for confessing a judgment executed by any person in custody of any sheriff or other officer shall be of any force, unless some attorney for and on behalf of such person in custody, and expressly named by him, be present to inform him of the nature of such warrant, which attorney shall subscribe his name as a witness to the due execution thereof. *R. Eas. 15 Car. 2.*

The court by degrees relaxed in their observance of this rule, and even held that if plaintiff's attorney was present it was sufficient. *Andrews v. Richards, 1 Barn. 242.*

Whereupon the following rule was made:

The court taking notice of the great inconveniencies arising from holding a warrant of attorney to confess judgment by a person in custody to be good, if

any

C. B.

No bailiff or sheriff's officer shall presume to exact or take from any person, being in his custody, any warrant to acknowledge a judgment but in the presence of an attorney for the defendant, which attorney shall then subscribe his name thereunto, which said warrant shall be produced when the said judgment shall be acknowledged; and no attorney shall enter or acknowledge, or cause to be entered and acknowledged, any judgment by colour of any warrant gotten from any defendant being under arrest, otherwise than as aforesaid. *R. 15 Geo. 2.*

If in custody, an attorney must be present.

Every warrant of attorney for confessing a judgment in this court shall be read over by the person who is to execute the same, or by some other person to him, before the execution thereof; and if judgment shall be entered up upon any such warrant of attorney which shall not be so read

D 2

over

any attorney, though for the opposite party, be present; order, that in future an attorney on behalf of the defendant be present upon the execution of every such warrant of attorney. R. 4 Geo. 2. Str. 902.

over as aforesaid, such judgment upon motion may be set aside as irregular. R. 15 Geo. 2.

N. B. This last rule is now declared not to be in force. Buller J. said it was absurd, nor did probonetary know of its ever having been acted upon. Taylor v. Parkinson, 2 H. Blac. 383.

Explanation of the above rules of court.

The above rules being intended for the protection of prisoners, and to prevent impositions upon them, have received a liberal construction; and the courts entertain the same jurisdiction of the matter before as after the judgment entered upon any warrant of attorney so obtained, and will order such warrant of attorney and all collateral securities to be delivered up and cancelled. *Duncan v. Thomas*, Doug. 196.

Extend only to those in custody on mesne process;

These rules only extend to persons in custody upon mesne process, and not to those in custody upon an execution. The reason is, because in the former case the debt is not liquidated, and therefore under duress he may be prevailed upon to confess more than is really due; but in the latter, it is liquidated. *Fell v. Riley*, Cow. 281. Str. 1245.

and civil process;

Nor to persons in custody under criminal process. *Charlton v. Fletcher*, 4 D. & E. 433.

and to warrants given to plaintiff himself;

Nor to warrants of attorney given to a third person, not the party, at whose suit he is in custody. *Finn v. Hutchinson*, Ld. Ray. 797. *Gillman v. Hill*, Cow. 142. *Churchy v. Roffe*, 5 Mod. 144.

and in the same cause.

Nor to warrants to confess judgment in any other action except in the particular cause whereupon he is in custody. *Holcombe v. Wade*, Bur. 1793.

Some exceptions to the rules in case of persons in custody in execution.

But these rules are not without exception; for if it could be shewn that a party even in execution, had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief,

SEC. III.] WARRANT OF ATTORNEY.

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lief, because cases of fraud and imposition are exceptions to all rules whatever. *Fell v. Riley*, Cow. 281.

And in general it is the safest way, and has the fairest appearance, to have defendant's attorney present when a warrant of attorney is taken from a prisoner, though in execution. *Parkinson v. Caines*, 3 D. & E. 618.

A defendant lodging within the rules of the Fleet, at the house of the plaintiff, who was the officer that had arrested him, and who afterwards became security to the warden, was deemed a prisoner within the meaning of the above rules of court, because the plaintiff could at any time deliver him into custody. *Warbaker v. Gascoigne*, Blac. 1297. What is deemed being in custody.

As to the attorney required by the rules, it must be a regular admitted attorney, not a clerk. Bar. 42. What attorney must be present. *Barnes v. Ward*.

And he must attend as attorney for the defendant. *Ruffle v. Hitchcock*, Blac. 1097.

But it need not be an attorney of the same court in which the judgment is to be entered up. *Bland v. Packenham*, Str. 530. *Vilmot v. Barry*, Bar. 44.

But if defendant himself be an attorney, no other need attend. *Walton v. Stanton*, Bar. 37.

The above rule of court must be adhered to, though the warrant of attorney to confess judgment here be given in Ireland. Str. 1247. Rule extends to warrants given in Ireland.

But even as to this part of the rule, there may be exceptions; for the courts will not suffer their rules to be made instruments of fraud. Exceptions as to this part of rule.

If therefore such warrant be executed by defendant, (no attorney being present,) purposely with a view to cheat plaintiff, court will not relieve. *Gilman v. Hill*, Cow. 141. In cases of fraud.

The next thing to be considered is, the consideration of such warrant of attorney. The consideration of the warrant.

Usurious consideration bad.

If given upon an usurious contract or consideration, court will on motion direct an issue to try the usury, and enlarge the rule to set aside the judgment in the mean time; and if the fact be so found, warrant of attorney will be vacated. *Cook v. Jones*, Cow. 727. *Machin v. Delaval*, Bar. 52.

Or if obtained by fraud.

So if such warrant be obtained by fraud, court will order it to be delivered up, even before judgment entered thereon. *Duncan v. Thomas*, Doug. 196.

How such facts shall be tried.

If the validity of the warrant of attorney be contested on the ground of forgery or the like, court will order an issue to try whether it were duly executed or not. Bar. 239. *Gibson v. Bishop of Bath and Wells*.

B.

B. Of the Operation and Extent of the Warrant of Attorney, and of the Revocation and Countermand thereof.

Judgment must be agreeable to the power.

A judgment entered under a power of attorney, must be warranted by that power, and consequently a general power only warrants a general judgment and execution, not a special one. *Buxton v. Barden*, 1 D. & E. 80.

Case of debtor being discharged under insolvent act.

Thus, where a defendant gave a warrant of attorney, and before judgment entered thereon, was discharged under the insolvent act, whereby his person cannot be taken in execution, but the execution is special against certain goods only, plaintiff cannot afterwards enter up judgment and sue out such special execution. *Ib.*

His only way seems to be, to move the court to plead the act for the defendant, and thus the special exemption is put upon the record, and the special execution may follow. *Ib.*

Case of bankruptcy.

A bond and warrant of attorney to confess judgment given by a bankrupt after his bankruptcy, (who was in execution for a debt due before,) is not barred by his certificate. *Birch v. Sharland*, 1 D. & E. 715.

If the warrant be to confess judgment of a certain term, judgment can be entered only of that term. *1 Mod. 1.* But if general, it may be entered within the time mentioned, *post* C. If warrant specifies particular term to enter judgment.

If an executor confesses judgment, or suffers judgment by default, he admits assets, and is estopped to say the contrary in an action on such judgment, suggesting a *devastavit*. *Skelton v. Hawling, 1 Wil. 258.* If an executor gives a warrant.

A warrant of one executor is not sufficient to enter up judgment against the other, because it would be estopping the other from saying that he is not executor; and being without his knowledge, it might subject him to a *devastavit* for the paying of other debts. *Str. 20.*

If a bond and warrant of attorney be given, and condition of bond is not to pay the money till a certain day, it shall operate as a *cesset executio* until that time; and if judgment be entered up, and execution issue before, court will set execution aside, but suffer the judgment to stand. *Anon. Cas. temp. Hard. 270.* Such security is a cesset executio for a time.

So, though a general warrant be given, if afterwards, on a distinct paper not under seal, plaintiff engages not to enter up judgment, or take out execution till a certain day, if he breaks his agreement, court will interfere on motion. *Hatton v. Young, Blac. 943.* How court will interfere if not abided by.

A man after he has given a warrant to enter a judgment, cannot revoke it by the course of the court; and though he endeavour to revoke it, yet the court of K. B. will give leave to plaintiff to enter the judgment. *Ld. Ray. 850.* Of the revocation of the warrant.

But the death of the defendant who gave the warrant is of itself a countermand, *1 Vent. 310*; although this is under certain restrictions; for if he dies before a year and a day has elapsed from the time of signing the warrant, the judgment may still be entered either of the term in which he died, or of the preceding term if he died in vacation. *Chancy v. Needham, Str. 1081. Savill v. Willshire, Bar. 270. Oades v. Woodward, Sal. 87.* By death of defendant.

And though he be dead since, yet if court have granted leave to enter up judgment, they will not afterwards recal it. *Ib.*

So, the death of the plaintiff, for whose benefit and at whose suit the judgment was to be confessed, puts an end to the power, and judgment cannot afterwards be entered, unless the warrant mentions to enter judgment at the suit of him, his heirs, executors, or administrators, in which case executors by leave of court may enter judgment. *Wild v. Sands*, Str. 718. *Coles v. Haden*, Bar. 44.

By marriage of the person giving the power.

So, if a warrant of attorney be given by a feme sole, and she afterwards marry before judgment entered, it is a countermand, and judgment shall not be entered against the husband and wife, for that would charge the husband, *Anon. Sal. 117*; though it seems as reasonable that he should be charged in this case as for a bond or other debt, which he is liable for during the coverture, though not after. *Ib.*

And in *Show. 89*, it is said, that a bill may be filed and judgment entered against both.

Of the person to whom it is given.

What application to the court necessary.

But if the warrant be given to a feme sole, marriage is no countermand, because it is for the husband's advantage, *Sal. 117*; and judgment may be entered up in the names of the husband and wife, *7 Mod. 53. Marder v. Lee*, Burr. 1469; in which latter case, judgment was held irregular for want of an application to the court for leave to enter it up, founded upon a proper affidavit of the marriage.

C. Of entering up the Judgment on Warrant of Attorney.

The warrant operates according as it is special or general, as observed *ante B. p. 38*: but if it be in the usual form to enter up judgment of such a term, or any subsequent term, it then falls within the rules hereafter mentioned.

Judgment

SEC. III.] WARRANT OF ATTORNEY.

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Judgment on such warrant of attorney must be entered within the year and day, after which it cannot be done without leave of the court, 6 Mod. 212. *Lusington v. Waller*, 1 H. Blac. 94; for the plaintiff cannot of his own accord enter it as of a term when the party was alive.

When judgment may be entered without leave, when with leave of the court.

Nor will the court grant such leave without an affidavit that the debt is unpaid, and the defendant is living; but if it states that he was alive within the term in which the application is made, it is sufficient, but not at a more distant period.

Of moving the court, and of the affidavit when the party was living.

Where the plaintiff was a lunatic, court held affidavit good as to debt being unpaid, sworn by the person who for the last three years had received the interest on the bond. *Coppendall v. Sunderland*, Bar. 42.

The reason seems to be this; death, generally speaking, is a revocation of the power; judgment ought therefore to be entered up during the life of the defendant.

This judgment may be entered up without leave any time within the year; if, therefore, the party dies within the year, judgment will appear to be entered in his lifetime; for if he dies in term it will have relation to the first day of term, and if in vacation, it may be entered as of the preceding term; but after the expiration of the year, judgment must be entered as of that term in which he has leave: it is necessary, therefore, that it should appear to the court granting such leave, that the defendant be alive, but if alive within the term it is sufficient, because judgment entered of that term will bear relation to the first day of the term, and though in fact entered after the party's death it will be consistent. *Fuller v. Josslyn*, 1 Barn. 357.

Why such application to the court necessary.

Of the relation of the judgment to the first day of the term.

Nor can any detriment accrue to purchasers from this practice, since by the statute of frauds judgments with respect to them refer not to the first day of the term, but to the time of the actual signing, which is marked on the roll. *Gady v. Woodward*, 7 Mod. 93.

Purchasers not hurt thereby since the statute of frauds.

And the relation of the judgment to the first day of term is so material, that if on that day the party who entered

So the authority relates to the first day of term.

entered up judgment appears not to have had authority so to do, though in fact at the time he signed and entered up judgment he had authority, it will be bad. *Gainfborough Executor v. Follyard*, Str. 1128.

How if testator died same day judgment signed.

Where testator died on same day judgment was signed, but before it was signed, held good, on authority of Shelly's case and Woodward's case, 7 Mod. 203. *Fulmer v. Johnson*, Cas. Tem. Hard. 158.

Of warrant on post obit bond.

When judgment has not been entered within a year and a day on a warrant of attorney given with a *post obit* bond, and the obligee does not apply for leave to enter it till after the death of the person on whose death it is payable, court will not grant leave without a rule to shew cause. *Lusington v. Waller*, 1 H. Blac. 94.

Of warrant given to two, and judgment by survivor.

On a warrant of attorney to confess judgment to two, it may be entered on motion for the survivor. 2 Blac. 1301. *Futcher v. Smith*. *Todd v. Dodd*, 1 Wil. 312. *Still v. Still*, Bar. 40. Cont. *Laycock v. Garforth*, Bar. 45.

The courts are very cautious in granting leave to enter judgments *nunc pro tunc*, and refused it where the warrant was above 20 years old, upon the ground of presumption that the debt was satisfied. *Flower v. Ld. Bolingbroke*, Str. 639.

Judgment on warrants not amendable.

The defendant's name in a judgment on a warrant of attorney not amendable, though both the warrant of attorney and the bill upon the file were otherwise. *Sal v. Crompton*, 1 Wil. 61.

How to enter up the Judgment.

Judgment on a warrant of attorney is final. It is signed therefore on a double half crown stamp. Common bail must be first filed, and a memorandum of warrant to enter such judgment as directed by stat. 25 Geo. 3. c. 80. sec. 19, which may be had at the stationers; the warrants of attorney and memorandum of the term judgment is signed, must be entered on roll in the usual way.

But

IV. SEC. IV.] JUDGMENT OF NON PROS.

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But it is first necessary to prepare an affidavit by the plaintiff and the subscribing witness to the warrant of attorney, that it was given for a just debt, that the debt is still unpaid, and that subscribing witness saw defendant duly sign and execute the warrant.

If judgment to be entered up in term, it is a motion of course signed by counsel; if in vacation, judge, on affidavit being brought to him, will make an order.

This is upon the supposition that the judgment be entered within a year and a day; if not, leave of the court must be first obtained as before-mentioned, and if the judgment be of above twenty years standing, it is only a rule to shew cause.

SECTION IV.

Of Judgment of Non Pros.

If plaintiff does not comply with the rules and orders of the court to be observed on his part, by declaring, replying, surrejoinder, or entering the issue in due time, when ruled so to do, judgment of *non pros* for such his omission may be signed, which is final.

Get a roll, enter thereon warrant of attorney for defendant only; ingross *non pros* thereon; also ingross same on a double 2s. 6d. stamp paper, and carry it to clerk of judgments in B. R.—prothonotary in C. B. who will sign same,—pay 3s.

Get costs taxed, and sue out execution, or bring an action for the same, which may be done though under 40s.

K. B.

By a rule of court Michaelmas 1654. sec. 15.

If the plaintiff declares not the second term, though the defendant give no rule, yet a *non pros* may be entered at the end of the

C. B.

The same rule as in K. B. was also made in this court, Michaelmas 1654. But the practice here is now governed by a subsequent rule of Hil. 9 Ann.

Of signing non pros for want of declaration.

Upon

JUDGMENT OF NON PROS. [Ch. XIV.]

the second term, upon a continuance over by him dies datus, but not the third term or after.

And by stat. 13 Car. 2. st. 2. c. 2. sec. 3. That upon appearance to be entered in the term wherein the writ or process is returnable, unless the plaintiff declare before the end of the term next following after appearance, that then a nonsuit for want of a declaration may be entered against him, and defendant shall recover his costs.

If the action be by original, defendant may sign non pros any time before esjoin day of third term without a rule to declare, having entered appearance of the term writ is returnable. Imp. K. B. 469.

Upon all process returnable, the first or any other return in any term, the plaintiff shall have liberty to the end of the next ensuing term, to deliver his declaration to the defendant's attorney, or of leaving the same in the office; and defendant's attorney having entered his appearance with the proper officer as of that term in which the process is returnable, and at the end of the ensuing term, or in four days after the end thereof, having given a rule to declare in the proper office, (it is a rule with the secondary which expires in four days,) and having called on the plaintiff's attorney or clerk in court, (if he can be found,) the defendant any time in the vacation of such ensuing term, after the rule for declaring is out, may sign his non pros for want of a declaration and not afterwards, and the plaintiff shall not, without leave of the court, have any longer time to declare in, than as above said, other than the time to be limited by the defendant's rule.

Defendant by the above rule must sign judgment of non pros for not declaring, in the vacation after second term; he cannot wait till the third time. Towers v. Powell, 1 H. B. 87.

If not signed, declaration may still be delivered.

By the general rule of law a plaintiff must declare within twelve months after the return of the writ, or he will be out of court. But by the rules of the courts, if he do not deliver his declaration within two terms, defendant may sign judgment of non pros. If, however, no such judgment be signed, plaintiff may still deliver his declaration at any time within the year. Worley v.

Litt,

Lee, 2 D. & E. 112. *Penny v. Harvey*, 3 D. & E. 123.
Sherfon v. Hughes, 5 D. & E. 36.

The defendant having surrendered in discharge of his bail in K. B. removed himself by *habeas corpus* to the Fleet, and plaintiff declared against him there, after the end of the second term after the writ was returnable. A judgment of *non pros* signed afterwards was irregular. *Sherfon v. Hughes*, 5 D. & E. 35.

But if there be a treaty between plaintiff and defendant, he is not obliged to declare within that time. *Walker v. Steward*, 3 Wils. 455.

If treaty of compromise, plaintiff need not declare.

If a man appears at the day of the return of the process, and puts in bail, though he never was arrested, nor the process returned, yet if plaintiff does not declare within two terms, a *non pros* may be signed. *Salk*. 456.

How if plaintiff appears without arrest or service of process.

In both courts it seems necessary that common bail should be filed, or an appearance entered within the term in which writ is returnable, or defendant cannot sign *non pros* for want of declaration.

When common bail must be filed to warrant a *non pros*.

See Rules above, and *Holmes v. White*, K. B. East. 11 Geo. 3. Imp. K. B. 469.

For this reason, a prisoner when superseded on filing common bail cannot sign judgment of *non pros*, as he is not entitled to his *superfedeas* till after the second term.

But there seems to be a difference in their practice with respect to giving the plaintiff a rule to declare before *non pros* signed; in K. B. no such rule is necessary, but in C. B. it is.

When rule to declare necessary to warrant *non pros*.

So that in B. R. plaintiff has only to the end of the second term to declare in, whether called upon by rule or not; but in C. B. he has till the *essoin* day of the third term if not called upon by rule. P. R. 121. *Steward v. Harding*.

And

And at what time to be given.

And rule to declare must be given at the end of second term, or within four days after. *Allen v. Milward*, Hil. 30 G. 3.

Giving rules to declare and calling for declaration are as necessary in signing a *non pros* in C. B. as giving rules to plead and calling for plea is necessary before signing judgment for want of plea in B. R.

Not necessary if plaintiff has had time to declare.

But where the plaintiff does not declare after having obtained time for that purpose, the defendant at the expiration of such time may sign judgment of *non pros* without giving any rule to declare; upon the same principle as where time to plead has been given, no rule to plead is necessary. *Towers v. Powell*, 1 T. R. 87. And if the time to declare had been till the last day of Trinity Term, the defendant might in the vacation sign judgment of *non pros* of Trinity Term. *Ib.*

Demand of declaration when necessary to warrant non pros.

If a rule to declare be given, then it is sufficient, there is no occasion for a demand of declaration.

The plaintiff in replevin being removed into this court by *re. fa. lo.* and defendant having given a rule to declare, he may sign judgment of *non pros* for want of declaring without demanding a declaration. *James v. Moody*, 1 C. B. T. R. 281.

Notice of declaration necessary.

Though declaration be filed in office, yet if no notice thereof be given within two terms, defendant may sign *non pros*, provided he has done nothing to waive the notice. Anon. 1 Barn. 362.

Of non pros for not replying &c.

Plaintiff may also be nonsuited at any other stage of the cause, as for not replying, surrejoining, or entering the issue when ruled so to do. But if defendant sign judgment of *non pros* for not entering issue, he must do it immediately on expiration of the rule so to do; otherwise if the roll be brought in afterwards before such judgment actually signed, the judgment will be irregular. Therefore the defendant is bound to search in the office, whether the plaintiff has brought in the issue roll immediately before he signs judgment of *non pros*, even though he may have searched the day before upon the expiration

For not entering issue, and what defendant must do before non pros signed.

SEC. IV.] JUDGMENT OF NON PROS.

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expiration of the rule to bring in the roll. *Minus v. Baxter*, 1 T. R. 16.

But see the case of *Thompson v. Ryall*, 4 D. & E. 195, which seems *contra*.

In a joint action against two or more defendants, plaintiff cannot be *non proessed* unless by all the defendants. Doug. 169, *Powell v. White* and others. So, though two writs be served, four defendants in one writ, and three in the other: nor can they sign distinct and several judgments of *non pros*; but if plaintiff does not proceed against them, one judgment can only be signed against him. 4 Burr. 2418. *Pryce v. Foulks* and others.

Of a non pros in a joint action against several defendants.

And although they appear severally by separate attorneys, yet there must be but one joint judgment of *non pros*. Com. 74.

How if they appear severally;

Or if plaintiff declares against them jointly, and they sever in their pleas, one cannot enter a *non pros*, for by a *non pros* plaintiff is out of court as to all the defendants, which is the material difference between a *non pros* and a *noll pros*. *Powell v. White*, Doug. 169.

or plead separately.

But the above rule only holds where the action is a joint action against them all, for wherever it can appear to be his intention to proceed against the defendants separately, judgment of *non pros* may be signed by all or any of the defendants named in the writ, if not duly proceeded against. *Butler v. Upton*, 2 D. & E. 258.

How if plaintiff declares severally against them.

Thus if plaintiff declares against one of two defendants named in his writ, and does not proceed against the other, the latter may sign *non pros*.

So if plaintiff serves notice of declaration, or takes out a rule for time to declare against one only, and does not proceed against the other. *Roe v. Cock*, 2 D. & E. 457.

If defendant removes a cause by *habeas corpus* into B. R. he cannot have a *non pros* for want of a declaration,

Of non pros when cause removed by habeas corpus.

tion, for plaintiff is not bound to follow him, but he must declare in two terms. Imp. K. B. 469.

How pending
an injunction;
or after out-
lawry.

No *non pros* can be signed pending an injunction, nor after outlawry reversed; but if the plaintiff does not declare within two terms after outlawry reversed, the defendant may give a rule to this effect, viz. That unless the plaintiff declare in the cause within four days after notice of the rule to him or his attorney given, he shall pay to the defendant or his attorney, costs to be taxed by the prothonotary. See the Rule Trin. 33 Car. 2.

If plaintiff's at-
torney does not
produce his cli-
ent, court will
sometimes order
a non pros.

In B. R. the plaintiff's attorney was summoned before a judge to produce his client, and the judge made an order that unless he produced him within a month, the defendant should, by consent, be at liberty to sign a *non pros*. He did not produce him within a month, and the *non pros* was signed; and on affidavit made that no such man as the plaintiff could be found, the court on motion, made a rule upon the attorney to pay the costs; and afterwards, upon an affidavit that they were demanded and unpaid, the court granted an attachment against him. *Gynn v. Kirby*, Stra. 402.

Of costs of non
pros.

When a judgment of *non pros* is signed, plaintiff becomes liable to pay defendant the costs he has been put to *pro falso clamore*. An action of debt may be brought against him for such costs.

As to executors,
&c.

Executors and administrators pay costs upon being *non proessed*, for want of declaring in due time. 4 Burr. 1584.

When plaintiff
removed by re.
fa. lo.

Where a defendant removes proceedings by *re. fa. lo.* from a county court into one of the superior courts, and signs judgment of *non pros*, in default of plaintiff's appearing, he is entitled to costs.

Of explanation
of 13 Car. 2, &
4 Jac. 1.

Not indeed under stat. 13 Car. 2. st. 2. c. 2. because that act is confined to actions commenced in the superior courts; but under 4 Jac. 1. c. 3. whereby in all cases wherein a party is entitled to his judgment, he is entitled to his costs. *Davis v. James*, 1 D. & E. 373.

Whether

Whether plaintiff after a *non pros* may hold defendant to bail again, for same cause of action, see vol. I. p. 50, § 1. Of holding defendant again to bail after non pros.

If a *non pros* is signed irregularly, plaintiff may proceed to judgment. How if a non pros signed irregularly.

Defendant pleaded a tender, but brought no money into court; he gave a rule to reply, and for want of a replication, signed judgment of *non pros*. Plaintiff looking on the plea as a nullity for want of the money in court, signed judgment after the *non pros* obtained, which the court held to be regular, and set aside the *non pros*. Barn. 252.

A *non pros* may be set aside for irregularity, on affidavit of facts. How to be set aside.

The court refused to set aside a *non pros* regularly obtained by defendant against plaintiff, who was only a common informer, though the plaintiff offered to pay the costs. Had the plaintiff been the party really injured, it might have borne a different consideration; but the court would not exercise their discretionary power, when the plaintiff was merely a common informer. *Bennet v. Smith*. Burr. 401. Refused in a qui tam action.

Motion was made to set aside a *non pros* signed for want of a declaration, which had been demanded of plaintiff's attorney in the country, and not of the agent in town. It was upon shewing cause sworn, that the plaintiff's attorney in the country agreed it should be regular. *Per cur.* Let the *non pros* be set aside. No agreement of country attornies, can vary the practice of the court. All transactions of this kind must be in town. Barnes 311. Set aside where demand of declaration was of country attorney.

SECTION V.

Of Judgment as in case of a Nonsuit.

- A. The Nature, Meaning, and Origin thereof.
- B. When to be moved for.
- C. How to be moved for.
- D. What Excuse sufficient, and of the peremptory Undertaking.
- E. In what Case such Judgment not allowed.
- F. Whether Defendant can have such Judgment, and also have Costs for Plaintiff's not proceeding to Trial.

3. A. The Nature and Meaning of such Judgment.

For the nature, meaning, and origin of the motion for judgment as in case of a nonsuit, see vol. I. c. 9. f. 3. title Of carrying down the record by proviso.

B.

B. When to be moved for.

At what time defendant must give notice of trial, after issue joined in K. B. and in C. B.

In K. B.

The plaintiff is not bound to give notice of trial, till the term after that in which issue is joined. Hall v. Buchanan, 2 D. & E. 734.

So that if issue be joined early enough in a term, to enable the plaintiff to give notice of trial for the sittings after that term, he is not obliged to do so, nor is the defendant entitled to judgment as in case of a nonsuit, for
not

C. B.

Where issue is joined early enough in the term for plaintiff to give notice of trial, notice must be given in the same term, or judgment as in the case of a nonsuit may be moved for. 1 H. B. 65. Otherwise the plaintiff has the whole of the term, next to that in which issue is joined to try his cause in. Baker v. Newman, lb. 123.

In the last case the motion
was

not proceeding to trial, unless the plaintiff has in fact given notice of trial. *Hunt v. Tremamando*, 4 D. & E. 557.

But if he does give such notice and not proceed, defendant is entitled to judgment.

So, if notice of trial is given, and afterwards countermanded, plaintiff ought to give fresh notice to proceed next term; or the term after judgment may be moved for.

If an issue be joined in Trinity term, and delivered in a country cause, with notice of trial for the then next assizes; if the plaintiff does not try his cause, the defendant may move for judgment as in the case of a nonsuit in Michaelmas term, (although he compel the plaintiff by rule, to enter his issue in that same Michaelmas term).

If an issue be delivered so late in a country cause, that the plaintiff could not give notice of trial as of Trinity term, then the defendant cannot move for judgment as in the case of a nonsuit, until Easter term following (his default not happening till Lent assizes).

was made on the 3d February, in Hilary term, and the reporter subjoins the following note: there were other days appointed for sittings in the term, after the 3d February. Query, Whether defendant would not have been entitled to judgment as in case of a nonsuit, if he had waited till the end of the term before he made his motion?

©. How to move for Judgment as in case of Nonsuit.

First, get rule for plaintiff to enter his issue, if it be not already done, for which see *Ante*, vol. I. p. 402. c. 9. sec. 1. if he does not comply with rule, sign judgment of *non pros*; otherwise, when the issue is entered, proceed as follows:

E 2

Make

Make affidavit of the term when issue was joined, or notice of trial given, or the like, and that plaintiff did not proceed in pursuance thereof, or as the fact may be.

K. B.

Give it to Counsel with 10s. 6d. and remember to have your roll in court; or if you are at Westminster before the sitting of the court, Mr. Austin will mark it in the treasury "read"; pay 1s. 6d. in the evening; draw up your rule, pay 6s.; serve copy on plaintiff's attorney, make affidavit of the service; give it to counsel with one guinea to make it absolute, which cannot be moved by him till the day after the day for shewing cause.

If the defendant makes the rule absolute, draw up same at the clerk of the rules; pay 5s. then get a double 2s. 6d. stamp put upon the rule, bespeak the roll of Mr. Edge, so as the master may mark the costs; pay in term time 1s. 6d.; in vacation 5s. 10d. more for the keys of the treasury; chief clerk's fee, 4s. 6d.

In this court no notice of motion necessary.

C. B.

Ingross affidavit on an 1s. 6d. stamp paper, swear it before a judge, and then speak to Mr. Sherwood to have roll in court, pay him 3s. 4d.; give affidavit to a serjeant with a fee of 10s. 6d., and he will move for judgment as in the case of a nonsuit; in the evening draw up rule at the secondaries, pay 5s. 6d.; serve copy thereof on plaintiff's attorney or clerk, shew the original, and on the day for shewing cause, have the affidavit of service ready; and add these words, "and at the same time shewed him the said original rule." Give affidavit to a serjeant with a guinea, to move to make the rule absolute, which if no cause shewn is of course; then draw up rule at secondaries, pay 6s. if of common length; take same with a double half crown stamp paper (make an incipit of the declaration thereon) to the protobonotary's clerk, and he will sign judgment; pay 7s. 4d. then tax the costs and take out execution.

The affidavit as the ground for such judgment for not proceeding to trial in due time, issue having been joined the last term should state, that issue had been joined early enough in the last term, for the plaintiff to have tried his cause in that term. *Woulfe v. Shells*, 1 C. L. 282.

But in the third term, a general affidavit would be sufficient, stating issue was joined in the former term. Ib.

In this court notice of motion requisite.

D. What Excuse is sufficient, and of the peremptory Undertaking.

D.

In C. B., in all cases where an application is made for the first time for judgment, as in the case of a nonsuit, it is sufficient in answer to such application to undertake peremptorily to try without alleging any reason, for not having before tried the cause; and whatever may have been the former practice, in future it is to be understood, that the first motion for judgment as, &c. is only a mode of obtaining a peremptory undertaking, 2 C. B. 119, *Mallett v. Hilton*.

In C. B. peremptory undertaking is of itself sufficient in all cases upon the first application.

So indeed in K. B. it is a matter of course for a peremptory undertaking to be accepted.

And in K. B. almost a matter of course.

But if plaintiff has any real excuse for not proceeding, it will be admitted, as where his witnesses were prevented by illness from attending the trial. *Bar. 316, Jones v. Stephenson*. Or when he himself was ill. *Bar. 313, Clark v. Gorrill*.

What a good excuse for not proceeding.

Absence of witnesses.

It is a good cause against a rule for judgment as in case of a nonsuit, that defendant has become insolvent since action brought; for it would be extremely hard, if a party should be obliged to proceed, and put himself to expence, without a possibility of recovering either debt or costs. *Baily v. Wilkinson*, Doug. 671. But Q. as a general rule.

Insolvency of defendant.

If the cause is put off on a peremptory undertaking, and plaintiff still does not proceed, let defendant get office copy of rule, make affidavit of the fact, that plaintiff did not proceed to judgment according to his peremptory undertaking, and move the court for judgment thereon; it is absolute in first instance.

How if plaintiff does not proceed after peremptory undertaking.

Fresh notice of trial must after such undertaking be given.

Although plaintiff has undertaken peremptorily to proceed to trial at next assizes, yet defendant is not bound to attend and be prepared with witnesses, without having had fresh notice of trial.

Nor will the costs of such attendance and preparation be allowed, though he obtain judgment as in case of a nonsuit, on account of plaintiff's not proceeding to trial. *Ifield v. Weeks*, 1 C. B. 222.

So, fresh notice in C. B. of motion for judgment for not proceeding after such undertaking.

Although notice has been given of a motion for judgment as in case of a nonsuit, for not proceeding to trial in due time after issue joined, on which plaintiff enters into a peremptory undertaking to try; yet notice must also be given of the like motion, for not proceeding to trial in pursuance of the undertaking. *Gooch v. Pearson*, 1 C. B. 527.

There is no difference between the two motions. Statute requires notice in both. *Ib.*

When second excuse admitted

After peremptory undertaking, a second excuse may be shewn, and it is in the court's discretion to admit it or not. *Milton v. Terrill*. Bar. 315.

A term's notice not required in moving for this judgment.

In C. B. issue joined in Trinity 16 Geo. 3. defendant moved for judgment as in case of a nonsuit; on shewing cause it was contended, that as no proceedings had been had for a twelve month, neither party could now proceed without a term's notice to the other, which had not been given previous to this motion. But *per cur.* the rule, 13 Geo. 2. does not extend to motions of this sort being made previous to the statute, viz. 14 Geo. 2. c. 17.; and so it was determined formerly in *Row* and *Dunning*, Michaelmas, 18 Geo. 2. Barnes 308. But on hearing the merits, the rule was discharged on the usual terms. *Manley v. Wortley*, 2 Blac. Rep. 1223. See on Dem. *Phillips v. Moses*, 5 D. & E. 634.

Ⓒ.

Ⓒ. In what Cases Judgment as in Case of a Nonsuit not allowed.

This judgment founded on stat. 14 Geo. 2. c. 17.

This proceeding is founded upon the statute 14 Geo. 2. c. 17. whereby it is enacted, that "where any issue is, or shall be joined in any action or suit at law, "in

" in any of his Majesty's Court of Record at Westminster, the Court of Great Session for the Principality of Wales, the Court of Great Session for the County Palatine of Chester, the Court of Common Pleas for the County Palatine of Lancaster, or the Court of Pleas for the County Palatine of Durham; and the plaintiff or plaintiffs in any such action or suit, hath or have neglected, or shall neglect to bring such issue on to be tried *according to the course and practice of the said Courts respectively*, it shall and may be lawful for the Judge or Judges of the said Courts respectively, at any time after such neglect, upon motion made in open court, (due notice having been given thereof,) to give the like judgment for the defendant or defendants in every such action or suit, *as in cases of nonsuit*, unless the said Judge or Judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue, within the time or times so allowed, then and in every such case, the said Judge or Judges shall proceed to give such judgment as aforesaid."

And by Sec. 2. " All judgments given by virtue of this act, shall be of the like force and effect as judgments upon nonsuit, and of no other force and effect." " Provided also that the defendant or defendants shall, upon such judgment be awarded his, her, or their costs in any action or suit, where he, she, or they would, upon nonsuit, be entitled to the same, and in no other action or suits whatsoever."

Costs of such judgment.

First, this judgment is only where plaintiff hath neglected to bring the issue on to be tried, according to the practice of the courts.

Explanation of above statute.

When a plaintiff therefore has carried a record down for trial once, the court will not give judgment as in case of a nonsuit for not carrying it down a second time, even though it were made a *remanet* the first time; for the terms of the act are complied with by plaintiff's carrying record to trial once; and after that by the practice of the court, the defendant should carry down the record by proviso. *Newburn v. Langley*, 3 D. & E. 1.

1st, It does not extend to cases, where record has been once carried down.

So that where plaintiff obtained a verdict, and afterwards a new trial was granted, defendant cannot have judgment as in case of a nonsuit, if plaintiff does not proceed a second time to trial. *Porzelius v. Maddocks*, C. B. 101.

Or when plaintiff was nonsuited, and afterwards nonsuit was set aside, and plaintiff neglected to go to trial again. *The King v. Pippett*, 1 D. & E. 492.

Because if plaintiff does not give fresh notice and proceed to trial at the next sittings or assizes, defendant may afterwards carry record down by proviso.

Or where either party may in first instance carry it down.

In all cases therefore, where both parties are actors, and where defendant in the first instance, is entitled to try by proviso, defendant must still resort to trial by proviso, and cannot have judgment as in case of a nonsuit; for in such, plaintiff is no more obliged to carry down the record than defendant; as in actions of replevin. *Jones v. Concannon*, 3 D. & E. 661. *Shortridge v. Herne*, 5 D. & E. 400.

And this in both courts.

ad, Not to cases where plaintiff could not be nonsuited at the trial.

Secondly, By the words of the statute such judgment is only to be, where defendant would upon nonsuit be entitled to same. Whenever therefore plaintiff could not be nonsuited at trial, judgment as in case of nonsuit cannot be, because the case of a nonsuit does not at all exist. *Weller v. Joyton*, Burr. 359.

Thus when there is judgment by default against one defendant in a joint action, the other cannot nonsuit the plaintiff at the trial on issue joined by him, nor if the plaintiff neglect to proceed to trial can he obtain judgment as in case of a nonsuit. *Weller v. Gayton*, Burr. 358. See *Harris v. Butterley*, Cow. 483. *Hannay v. Smith*, 3 D. & E. 662.

So, after payment of money into court it is said that plaintiff cannot be nonsuited. But Q. And whether he cannot have judgment as in case of a nonsuit?

May be had on a mandamus.

Judgment as in case of a nonsuit, may be given in traverse of a return to a mandamus. *R. v. Mayor of Stafford*,

Stafford, 4 D. & E. 689. Though by 14 G. 2. c. 17. it seems only to extend to actions and suits between parties.

In B. R. a rule nisi in a *qui tam* action for like judgment as in case of a nonsuit, was made absolute, no cause being shewn. 1 Will. 325, *Watson v. Jackson*. Or *qui tam* action.

A common informer may be nonsuited, and a *qui tam* action is within the statute. Barnes 315.

This statute does not extend to a writ of right, so as to give costs to the tenant on a judgment as in case of a nonsuit. *Newman v. Goodman*, 2 Blac. Rep. 1093. Not in writ of right.

In a joint action all the defendants must join in the application for judgment, as in case of a nonsuit, whether they all appear and plead, or do not all appear. *Watson v. Jackson*, Say. 22. *Jennings v. Wilson*, Ib. 103. How such judgment to be obtained in a joint action.

In the case of *King v. Pippet*, 3 D. & E. Buller J. said, The defendant's counsel is not quite correct in saying that in case of a nonsuit, the plaintiff is out of court. I remember a case many years ago, where on a motion for judgment, as in case of a nonsuit, Lord Mansfield said it was very extraordinary to suppose the plaintiff out of court when he is nonsuited, for if he is nonsuited by mistake of the Judge at the trial, he could not afterwards move to set it aside unless he were in court. Q. How far plaintiff on a nonsuit is out of court.

If a rule to shew cause why there should not be judgment as in case of a nonsuit be discharged on an affidavit, which contains an answer false in itself, the court will not afterwards open the matter on an affidavit which disproves the contents of the former one, but if they saw reason to doubt it at the time, they would suspend their judgment till the matter was enquired into. *Davis v. Cottle*, 3 D. & E. 405. How if rule for such judgment be discharged on a false affidavit.

The court have laid it down as a general rule that though a writ of error may be brought on a judgment of nonsuit, yet the court will not in any case stay proceedings or set aside an execution for the costs on that account. *Box v. Bennett*, 1 C. B. 432. Of writ of error brought on such judgment. Whether a stay of proceedings.

So

So also is the case of *Kempland v. Macauley*, 5 D. & E. 436.; for it is manifest it is only brought for delay.

There is no occasion for any confession of that fact, for there can be no error of which plaintiff can avail himself, for if the record were manifestly erroneous, the plaintiff who has made default by suffering a nonsuit, can never have a judgment afterwards in his favour.

But in B. R. afterwards, in *Levett v. Perry*, 5 D. & E. 669, it seems otherwise, there proceedings on such a judgment were stayed, and though *Box* and *Bennet*, and *Kempland* and *Macauley* were cited, *per Cur.* The practice not to stay proceedings pending a writ of error must be confined to those cases where the party himself, his attorney, or bail, declare it is brought for delay.

Q. Whether after rule nisi for judgment, plaintiff can amend declaration.

After rule nisi for judgment as in case of a nonsuit, court will not grant rule for plaintiff to amend his declaration. *Eagles v. Osbadelstone*, Bar. 318. Nor to discontinue. *Lowe v. Peacock*, *lb.* 316.

Though in another case when issue was joined, and notice of trial given, but a mistake in the declaration being discovered, plaintiff did not proceed. Defendant applied for judgment as in case of a nonsuit. The court on shewing cause, gave leave, as the issue roll was not stuck into the bundle, and the amendment small, to amend on paying of costs, and for not proceeding to trial. *Barnes* 317, *Beere v. Bowling*.

Of costs on such judgment.

Executors are not liable to costs on a judgment as in case of a nonsuit, under statute 14 G. 2. c. 17. *Baile and others executors v. Holt*, 2 C. B. 277.

f.

f. Whether Defendant can have Judgment as in Case of Nonsuit, and Costs for not proceeding to Trial.

Motion for like judgment as in case of a nonsuit, and that the master should tax costs for not going to trial according

According to notice, not countermanded, refused; for costs in both cases being founded on different rights, ought not to be blended together. *Earl of Leicester v. Wooden*, Michaelmas, 21 Geo. 2.

But if the court on shewing cause against the judgment of nonsuit, grants plaintiff further time, it is always on payment of costs for not proceeding to trial, unless notice thereof was countermanded in time. *Ib.*

Defendant applied for, and had costs for plaintiff's not proceeding to trial; and afterwards moved for judgment as in case of a nonsuit; but the motion was denied, *per Cur.* He has made his election of one remedy, and cannot have the other. *Barnes* 316, *Ogle v. Moffit*.

After judgment, as in case of a nonsuit, however irregular, the defendant has made his election, and shall not afterwards have costs for not proceeding to trial. *Newman v. Goodinan*, Tr. 16 Geo. 3. 2 Blac. Rep. 1110.

A rule was granted to shew cause why there should not be judgment as in the case of a nonsuit, the plaintiff not having proceeded to trial in due time after issue joined. The affidavit on which the motion was grounded stated also, that the plaintiff had given notice of trial and had not countermanded it, but had entered the cause for trial, and withdrew the record after it was called on, by which the defendant had been put to the expence of witnesses, briefs, &c. Sufficient cause being shewn, the court discharged the rule, on a peremptory undertaking of the plaintiff to try the cause at the sittings after this term and on payment of the defendant's costs on account of the cause not being tried. This latter part of the rule was opposed on the part of plaintiff, and it was insisted that by the practice of this court the plaintiff could not have a rule for costs for not going on to trial, and a rule for judgment as in case of a nonsuit at the same time. But on consulting the prothonotary, who said he had often taxed costs in similar circumstances, the rule was discharged as abovementioned.

Jordaine

How if plaintiff enters his cause, but withdraws the record.

Rules for judgment and costs not to be had together.

JUDGMENT AS IN CASE OF NONSUIT. [Ch. XIV.]

Jordaine and others v. *Sharpe*, 2 C. B. T. 280. To which the reporter adds as a note,—

This seems to account for the court not allowing both rules, for the rule for judgment as in case of a nonsuit is sufficient to answer both purposes, if the affidavit be properly drawn.

CHAP. XV.

Of Proceedings by and against particular Persons.

SEC. 1. *Against Peers and Members of Parliament.*

SEC. 2. *By and against Attornies and other Officers of the Courts.*

SEC. 3. *Against Prisoners.*

SEC. 4. *Against Bail upon their Recognizance.*

SEC. 5. *By and against Infants.*

SEC. 6. *By and against Justices, Constables, Revenue Officers, &c.*

SEC. 7. *By and against Corporations.*

SEC. 8. *Against Hundredors.*

SEC. 9. *By Paupers.*

SECTION I.

Of Proceedings against Peers and Members of Parliament.

THE proceedings against peers and members of parliament are at present regulated by two statutes, the one 12 & 13 Will. 3. c. 3., and the other 10 Geo. 3. c. 50.; the first mentions in what way they are to be proceeded against, and also confines such proceedings to a certain period after the dissolution, prorogation, or adjournment, and before the meeting of any parliament; by the last act they may be proceeded against at any time, and the process by *distringas* to compel their appearance is rendered more effectual.

Regulated by
Stat. 12 & 13
W. 3. & 10 G. 3.

The mode of proceeding is either by original writ or original bill.

The mode of
proceeding.

Whether the courts had jurisdiction against peers and members of parliament by original bill before the statute of William, or whether even now they possess it is yet a matter of doubt.

Whether courts
have jurisdiction
against
peers by bill.

It

It was indeed holden in the case of Say and Lord Byron, and again in Gosling and Lord Weymouth, which was in the 18 Geo. 3, that a peer could be sued in the King's Bench by *bill*, and that it was the uniform practice, even before the statute of William which made no difference in respect of jurisdiction. Say. 63. Cowp. 845.

So, in the Common Pleas, the jurisdiction of proceeding against a member of parliament by bill seemed established in the case of *Dawson and Burridge*, *Ld. Ray*. 1442. *Str*. 734.

At all events if
sued by bill it
must be pleaded
in abatement.

(Appendix, P.)

But in a very late case the authorities of Say and Byron, and Gosling and Weymouth, (which last came before the court on a demurrer to a plea in abatement,) have been impeached, and held not decisive upon the subject, and the question of jurisdiction has been again set afloat, and it is still undecided, whether the King's Bench has jurisdiction against a peer by bill; but it is settled, that if any one does proceed by bill, and the defendant does not plead such want of jurisdiction in abatement, that it is afterwards too late to take advantage of it. *Earl of Lonsdale v. Littleton* in error, 2 H. Blac. 299, which case is inserted at large in Appendix, P. and contains much information on the jurisdiction of the courts in this respect.

Peers, &c. not
to be arrested.

The persons of peers and members of parliament are by the statutes privileged from arrests; for the extent of which privilege, See *ante* vol. I. p. 56. ch. 2. B. 2. b.

How to proceed by Bill.

Of proceedings
by bill.

Engross bill on treble 1d. stamp parchment; file it with clerk of declarations in B. R.; get it signed by protobonary in C. B.; then file it with filazer of the proper county, (i. e.) where the venue is laid; sue out a writ of summons to be engrossed on 2s. 6d. stamp parchment, signed by signer of writs in B. R.; pay 1s. 8d. by filazer in C. B., sealing 7d.; take it to sheriff of the county where venue is laid, to whom it is directed; get his summons for the officer to serve; pay sheriff 2s. 4d.; officer for serving summons, 5s.

If defendant not to be found in that county, sue out a *testatum* summons. Imp. K. B. 847.

If no Appearance.

If defendant do not appear within four days after return of writ, get return of summons; and if sheriff has given notice, sue out *distingas* to be engrossed on 2s. 6d. stamp parchment, signed by signer of writs in B. R. and filazer in C. B. pay 1s. 8d.; sealing 7d.; get warrant thereon, pay 2s. 4d.; give same to officer to levy, pay him 10s. If no appearance on return of *distingas*, get it returned from sheriff and sue out an *alias*; move to increase the issues, then issue a *pluries distingas* and move again to increase the issues, so on until enough is levied to cover your demand; after which move the court on the stat. of 10 Geo. 3. c. 50. for the application of the issues to the discharge of your debt and costs.

How if defendant does not appear.

If no goods in county where *venue* is laid, get *nihil* returned on first *distingas* and issue *testatum* into custody where goods are.

If Defendant appears.

Defendant must appear within four days after the return of the writ of summons; or if *distingas* issues, on the return day of the *distingas*.

How if defendant appears.

His appearance is effected by filing common bail in K. B. with clerk of bails; in C. B. with filazer; on entering appearance file memorandum of warrant to defend; then deliver declaration, (which in some respects differs from common declaration *,) and proceed as in other cases.

How to proceed by Original.

Peers and members of parliament cannot be proceeded against by original writ in B. R. in all actions; but in those only (such as case, trespass, ejectment, re-

Of proceedings by original.

* The only difference is, that in the beginning declaration states, A. B. complains of C. D. Earl or Duke of F, as the title may be; or if only a member complains of C. D. (having privilege of parliament) of a plea, &c

And in the breach if it be an action upon promises, the words (craftily and subtilly to deceive and defraud are omitted) and also after the word suit is added, and hereupon the said (Plaintiff) prays the process of our Lord the king, according to the form of the statute in such case made and provided to him thereon to be made, and it is granted to him, &c. Pledges, &c.

plevin,

plevin, and debt) which the King's Bench can hold plea of by original writ.

If the plaintiff proceeds by original, against a peer or commoner, the plaintiff makes out a *præcipe* as instructions for the curfitor to frame the original writ. This writ must then be delivered to the sheriff, who will make out a summons thereon; give summons to your officer to leave at defendant's house. A copy of the original is usually made out by plaintiff's attorney for the sheriff, and that is served as the summons on the defendant.

Upon the return of the original, it is filed with the filazer; if in B. R. or *cussos brevium*, if in C. B., and if the defendant appears, the proceedings are the same as in other cases.

Whether an effoin may be cast.

Formerly instead of appearing he might cast an effoin; but this is now much discouraged by the courts, and almost rendered obsolete, though I take it, it may still in certain actions be done. See vol. I. p. 7.

Should no appearance be entered with the filazer within four days after the *quarto die post* of the return of the original, or effoin cast; the plaintiff's attorney makes out a *præcipe* for a *disfringas*, and carries it to the proper filazer to draw out the same; it is signed and sealed; get a warrant thereon, which give to officer to levy; the first levy is 40s.

Of the *disfringas* and increasing issues.

If the defendant does not appear on the *quarto die post* of the return of the *disfringas*, the plaintiff's attorney must call upon the sheriff to return the writ; whereupon he may sue out an *alias*, and upon the return of that, a *pluries disfringas*. But instead of proceeding as formerly by the writ of *disfringas ad infinitum*, the plaintiff may now move the court, out of which the writ issues, by virtue of the 10 Geo. 3. c. 50. s. 3. for the sheriff to enlarge the issues, which the court will accordingly order to be increased to the amount of the plaintiff's demand.

If no appearance entered on the *quarto die post* of last *disfringas*, move the court in pursuance of statute, that issues may be sold and paid over to plaintiff.

Of the Motion to apply the Issues according to Statute.

The motion is (whether proceedings be by bill or original writ) for a rule to shew cause, "why the issues returned upon the several writs of *distringas* should not be fold, and the monies arising from the sale thereof, should not be forthwith brought into court; and why it should not be referred to the master to tax the plaintiff his costs, occasioned by his issuing out the said several writs; and why the costs, when taxed, should not be paid out of the monies so brought into court; and why the surplus of the said money, after payment of the said costs, should not be retained in court, until the purpose of the said writs is answered." Fee to counsel, 10s. 6d. This is moved upon an affidavit of the several writs of *distringas* having issued, and the returns thereto, and that the defendant hath not appeared; draw up rule; serve copy on the sheriff; shew the original rule; move the court on an affidavit of the service, and shewing the original rule to make it absolute; draw up rule; serve copy on the sheriff; shew the original, and if he does not bring the money into court, he will be liable to an attachment. Make out bill of costs, and tax them with the master.

Of applying the issues.

Nature of motion for that purpose.

All the proceedings against a peer or privileged person subsequent to the declaration, are the same as in other cases, except that their bodies cannot be taken in execution, unless the judgment is obtained upon a statute staple, or statute merchant, or upon the statute of Acton-Burnell 11 Edw. 1.; and then a *capias ad satisfaciendum* lies even against peers of the realm. 2 Crom. 142.

Of the proceedings subsequent to declaration.

How if Peer or Member be in actual Custody.

If a person having privilege of parliament be in the King's Bench Prison, as under sentence of the court on a criminal information or the like, there is no occasion of filing a bill against him, as having privilege, and issuing a summons and the like; but plaintiff may without any summons file a bill against him, as being in the custody of the marshal; but he cannot charge him in custody upon any bailable action, nor can he afterwards charge him in execution. *Jackson v. Moreth*, 5 D. & E. 361.

Of proceeding against a peer in custody.

OBSERVATIONS.

What the summons and mesne process should state if proceedings by bill;

if by original.

In the King's Bench the summons and its subsequent process, attachment, and *disfringas*, when the suit is by bill, do not state the cause of action at large, but only generally, as "to answer the said A. B. in a plea of trespass on the case to his damage of," &c. or that he render to the said A. B. 1000l. as the case is. Whereas if the suit is by *original*, the subsequent process of *disfringas* thereon, states the cause at large as in the original writ. And in C. B. whether the proceedings are by bill or original, all the process thereon states the whole as in the original bill or writ filed. 2 Crom. 138. But contra, Imp. C. B. 585.

Of the teste and return of such process.

The summons and other process when by bill, need not have fifteen days between the teste and return, but must be made returnable on a day certain. But when by original, they must have fifteen days between the teste and return, and must be made returnable on a general return.

Of the power of court as to increasing issues.

On motion to increase issues, it is discretionary in the court to order the amount; and they may order to the full amount on the first motion if they think proper. Bar. 418. Ib. 420. And the course of the King's Bench is now on motion, to order the amount of the whole debt to be levied on the *alias*.

How if defendant appears after *disfringas* issued but nothing levied.

The plaintiff in an action against a member of parliament, had proceeded agreeable to the act of 10 Geo. 3. c. 50. and had obtained rules for selling the issues levied upon a *disfringas*, *alias*, and *pluries*, and also a rule for an attachment against the sheriff: but no issues had been actually levied; and at length defendant appeared; whereupon it was moved, that these rules should all be discharged. For as no issues had been levied, they could not be sold (vide sec. 2. of the stat. 10 Geo. 3. c. 50.); and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side the plaintiff insisted

Upon what terms he will be let in.

on the costs of issuing the writs before the rules should be discharged; and the court thought that reasonable, and directed, that on payment of costs the rules should be discharged. They were of opinion, that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed in his suit or not. *Martin v. Townsend and Sawbridge*, Burr. 2725.

Quære, whether court will not also in such case lay defendant under terms to plead issuably, take short notice, &c. as he applies for a favour after having delayed plaintiff by his own laches. Imp. K. B. 486.

The statute 10 Geo. 3. extends to all writs of *distringas* in general, not merely to such as are issued against peers and members of parliament; as to cases of *distringas* against a late sheriff for not bringing in the body, &c. Burr. 2726.

The statute 10 Geo. 3. extends to all writs of *distringas* generally.

If a peer or member of parliament be proceeded against otherwise, than as above directed, the proceedings will be irregular, and will be set aside, or the defendant, if arrested, will be discharged upon motion. See vol. I. ch. 2. D.

Proceedings against a peer irregular if otherwise than as above.

But this summary remedy seems to be, where it appears on the record that the defendant is a peer, or has privilege. Otherwise the court will put defendant to his plea of privilege and prayer for a *superfedeas*, or will expect some further evidence of the fact, than a mere affidavit, if he wishes to be relieved on motion.

When in such case defendant will be discharged on motion and when he must plead his privilege.

As where a member of parliament had been held to special bail, and moved to be discharged on common bail, the court would not grant a rule to shew cause upon an affidavit only: but upon the attendance of the clerk of the crown or his deputy, with the sheriff's return, they ordered the rule to go. *Fenwick v. Fenwick*, Blac. 788.

So, on a motion made by Lord Banbury for a *superfedeas* to a *latitat*, which had issued against him by the name of Charles Knollys, the court denied the motion, and the Chief Justice said, they could not take notice

tice that this Charles Knollys is Earl of Banbury; and that there was a difference between this case and the case of a peer that had sat in the house; for if his lordship had ever been summoned to parliament, and had a writ to shew, and there was no dispute about the identity of the person, it would have been reasonable to have granted *superfedeas*. But in this case of a lord that has never sat there, they could not do it, for they could not try peerage on a motion; but his lordship might plead it and pray a *superfedeas*; and *per* Powel, if in the writ he had been named peer, it would have been superseded. Vent. 298. Ld. Ray. 1247. Salk. 512.

SECTION II.

Of Proceedings by and against Attornies.

What privileges
attornies enti-
tled to.

Attornies, as officers of the courts to which they respectively belong, and as being under the necessity of attending there for the purpose of conducting the business of their clients, are upon that account entitled to certain privileges when plaintiffs or defendants in an action.

As plaintiffs, they may sue by a particular process of the courts, called an attachment of privilege, and may try their cause at Westminster, let the nature of the action be what it may. And as defendants, they must be sued, not by the common writ of *latitat* or *capias*, but by bill, and in the court to which they belong, nor are their persons liable to be arrested on *mesne* process.

For the nature and extent of this privilege, see *Observations* to this section.

Of Proceeding by an Attorney Plaintiff.

Get attachment of privilege (which may be had on other blank writs) on 2s. 6d. stamp; fill it up.

Form of Attachment in K. B.

Attachment.

George the Third, &c. to the sheriff of Middlesex, greeting.
We command you that you attach C. D. and E. F. (any names)

of defendants not exceeding four may be put in this writ), if they may be found in your bailiwick, and them safely keep, so that you may have their bodies before us at Westminster, on next after (a day certain in term and not a general return day), to answer T. S. gentleman, being one of the attornies of our court, before us, according to the liberties and privileges of such attornies and other ministers of the same court, from time whereof the memory of man is not to the contrary, used and approved in the same court of a plea of trespass, (or whatever the action is), and have there this writ.

Witness, &c.

In C. B. the attachment is similar, *mutatis mutandis*.

Then make out *Præcipe* thus :

Middlesex attachment of privilege for T. S. gentleman, one of the attornies, &c. against C. D. defendant, returned Wednesday next, after the Morrow of all Souls. *Præcipe.*
21st October 1795. *Affidavit for 100l.*

No more than four defendants must be put in *præcipe* or attachment.

Carry writ and *præcipe* to signer of writs in K. B. or prothonotary in C. B. who will sign same *gratis*, and in C. B. the writ must be marked by clerk of warrants. In both courts, attachment must be sealed.

The above proceedings are ordered by the following rules of court :

B. R.

By Reg. H. 20 Geo. 2. every attorney of this court who shall sue out any attachment of privilege against any defendant; shall leave a *præcipe* with the signer of the writs with the defendants names, not exceeding four in each writ, with the return and day of signing such writ, with the agent's or attorney's name who sued out the same. And all such *præcipes* shall be entered on the roll, where the *præcipes* of latitat and all other writs issuing out of this court

C. B.

By Reg. H. 11 Geo. 2. you must take out a *præcipe* containing the plaintiff's and defendant's names, not exceeding four in the whole, with the return of the writ, day of signing, and the agent's or attorney's name who sues out the same: this *præcipe* you must leave with the prothonotary, who, without fee or reward, is to enter the same on a remembrance roll, to be kept in his office for that purpose, and he is not to sign any attachment of privilege, unless such *præcipe*

Rule of court respecting the *præcipe*.

Rule in C. B.
as to attachment being
signed by clerk
of warrants.

court are entered, and the officer who signs the writs in this court shall not sign such attachment till a præcipe be left with him for that purpose.

præcipe be left in his office at the time of signing thereof.

No attachment of privilege to be sealed unless the same be first stamped or signed by the clerk of the warrants of this court or his deputy, for which no fee is to be paid, to the intent to shew that such person is an attorney of this court, duly entered and continued on the roll of attorneys; and if not signed by the clerk of the warrants or his deputy, the same shall be of no force or require bail. R. T. 9 W. 3.

Above rules
must be observed.

If attachment issues without præcipe being left or signed by clerk of warrants as above, it will be set aside with costs. *Frogatt v. Tapscot*, 2 Blac. 919.

How the attachment must be if
bailable or not.

If the attachment requires only a common appearance, a copy must be served with notice as in other cases. If the party is to be held to bail, the sum sworn to must be marked on the back of the writ, and also the day it is sued out; but the attorney's name need not be indorsed thereon, the stat. 2 Geo. 2. c. 23. s. 22, not extending to cases where attorney is plaintiff, but only where they sue for a third person. *Fields one*, &c. v. *Lewen*, 4 T. R. 275.

Ac etiam need
not be inserted.

Nor need the *ac etiam* be inserted, though it may be usual so to do, but it is sufficient to mention the nature of the action as in a plea of trespass on the case, debt, &c. the same as if process was not bailable. The stat. of 13 Car. 2. St. 2. c. 2, which directs the *ac etiam*, particularly excepting attachments of privilege. 2 Wil. 392.

Of the teste and
return of attachment;

In C. B. the attachment must have fifteen days between the teste and return. Bar. 410.

its nature.

In B. R. an attachment of privilege is but as a *latitat* and not as an original. 1 Show. 367.

But

But it is there held in the nature of an original writ, and may be pleaded to without continuances till the declaration. *Finch v. Wilson* one, &c. of C. B. in error. 1 Wil. 167.

But an attachment of privilege is amendable though it is in the nature of an original writ, as if there are not fifteen days between the teste and return, &c. 1 Wil. 167.

In another case it has been said that an attachment of privilege in C. B. is not like an original writ, and therefore plaintiff may put several defendants into one attachment and declare against them severally. King's Rep. 38.

The fact is, it is strictly neither an original nor a *capias*, it answers the purposes of both, it warrants the proceedings as well as brings the party into court.

Thus although after judgment by default on common process, plaintiff may sue out a special original to warrant it in case error should be brought; yet an attorney has no need to sue out a new attachment of privilege to warrant his judgment. For where judgment was obtained against one defendant on a joint attachment of privilege against him and others, and he brought error, the court said, (upon denying leave to take out a separate attachment to warrant a judgment,) that by the practice of C. B. the old joint attachment seemed to be good and sufficient to warrant proceedings thereon, against defendants severally, as would be reported to the King's Bench, if they desired to be informed what was the practice in C. B. Vide Bar. 423, *Dixon v. Atkinson*.

B. R.

If the attachment in B. R. requires only a common appearance, a copy thereof is served with an English notice in writing subscribed as in other cases, and the appearance must be entered with the clerk of the common bails.

If

C. B.

If the attachment in C. B. requires only common bail after a copy thereof served with an English notice in writing, subscribed as in other cases, the appearance must be entered with the prothonotary, but if it requires special bail the clerk of the

F 4

How attachment served if action notailable, or special bail taken inailable action.

If it requires special bail, a judge's clerk takes the recognizance as in other cases. *the docquets prepares the bail piece or recognizance, and attends a judge of the court, where the same is entered into and the bail justified, or fresh bail is added in the same manner as the filazer does on mesne process by original.*

Of the declaration,

Engross declaration on treble 1d. stamp paper, the form thereof is the same as in other cases, except the beginning, which may be thus:—in

Form thereof.

B. R.

Middlesex, to wit, A. B. gentleman, one of the attornies of the court of our Lord the King, before the King himself, complains against C. D. being in the custody of the marshal of the Marshalsea, &c. (as in other declarations). Add pledges.

C. B.

Middlesex, C. D. late of &c. was attached by a writ of our Lord the King, of privilege issuing out of our court here to answer A. B. gentleman, one of the attornies of the court of our Lord the King, of the Bench here, according to the liberties and privileges of the same court, for such attornies and other ministers of the same Bench, time out of mind, used and approved of in the same, in a plea of trespass on the case, &c. and thereupon the said A. B. in his proper person, complains, &c. Add pledges.

Of the subsequent proceedings.

The subsequent proceedings at the suit of an attorney are the same as in other cases, and in the writs of inquiry or execution, he is described as in declaration.

When defendant must plead to declaration,

If an attorney delivers his declaration four days exclusive, before the end of the term in which attachment is returnable, the defendant must plead as of that term.

If an attorney delivers his declaration four days exclusive before the end of the term, in which the attachment was returnable, and enters a rule to plead, and demands a plea, the defendant shall be obliged to plead as of that term; and if he does not deliver his declaration in that time, the defendant is entitled to an imparlance.

And

And if he does not deliver his declaration before the effoin day of the subsequent term, the defendant may have an imparlance to the term next following.

Of Proceeding against an Attorney Defendant in K. B.

Prepare bill, (which is the same as the declaration, and only differs from common cases in the beginning*); engross it on parchment with a treble 1d. stamp; file it with clerk of declarations in K. B. office; make a copy thereof on treble 1d. stamp paper; this is to serve as the declaration; deliver it to the attorney or his known agent, and indorse thereon notice to plead; charge nothing for declaration.

How to proceed against attorney in K. B.

The indorsement may be thus, "This is a true copy of a bill filed against you, as of this present Michaelmas term; and unless you plead thereto in four days from the date hereof, judgment will be signed against you by default."

Of indorsing declaration with notice to plead.

This is upon the supposition that the bill be filed four days exclusive before the end of the term, otherwise defendant will be entitled to an imparlance, and notice to plead should be within first four days of next term.

Regulated according to time of delivery of declaration.

Four days time to plead is sufficient in all cases, though the attorney live above 20 miles from London, as he is supposed to be always present in court. *Mann v. Fletcher*, 5 D. & E. 369.

Four days always sufficient.

It used to be eight days, if above 20 miles, or *venue* in another county.

If defendant appears and pleads proceed to issue, as in other cases, charge him for his own entries on delivery of issue, but not for plaintiffs.

Of the subsequent proceedings if defendant appears.

* A bill against an attorney is in the following form: Middlesex, to wit. A. B. complains against C. D. gentleman, one of the attornies of the court of our Lord the King, before the King himself present here in court in his own proper person, for that, Whereas, &c. (as in other cases) and therefore he prays relief, &c.

T. S. for the plaintiff.

The defendant in person.

Pledges to prosecute,

{ John Doe,
and
Richard Roe.

If

If he does not appear.

If he does not appear give a rule to plead, and make a demand of plea which must be done, and sign judgment, and proceed with inquiry (if judgment not final) as in other cases.

Remedy against attorneys quick in K. B.

Thus in K. B. the remedy against attorneys is much speedier than in C. B. which see *infra*; and indeed quicker than in ordinary cases against common persons, as the declaration is immediately delivered on filing bill, without any delay of mesne process.

Of Proceeding against an Attorney Defendant in C. B.

How to proceed against an attorney in C. B.

An attorney of the Common Pleas also must be sued by bill, but the bill and declaration against an attorney are different in this court; the former being only to compel an appearance, and the latter not delivered till that is effected by Reg. Trin. 21 Car. 2. "No bill shall be filed against an officer, attorney, clerk, or minister of the court, in order to a forejudger, until the bill be actually entered on record, and a number roll actually put to the bill."

Rule Trin. 21 Car. 2. of entering bill on record.

Now out of use.

The above rule however, is in a great measure disused, and the method of proceeding at this day against an attorney defendant is as follows :

The plaintiff engrosses his bill on a slip of parchment stamped with a treble 1*d.* stamp, and carries it to the prothonotary, who marks it as entered, on being paid for the entry; and it is thereby supposed to be entered, though no number roll is put on the bill; which being done the bill must be carried to Westminster Hall, and given to one of the criers of the court, who calls the defendant in court, for which he is paid 1*s.* and he must be called three times in court. Cooke's Rep. 4. After which the plaintiff gives a rule on the bill with the secondary for the defendant to appear, for which he is paid 1*s.* 4*d.* viz. 1*s.* duty, and 4*d.* the rule; and then the bill is filed in the prothonotary's office, for which is paid 4*d.*; upon filing which bill, notice thereof must be given to the defendant in writing, by Reg. Hil. 11 Geo. 2. whereby it is ordered, that—

“ Where a bill shall be filed against an attorney of the court, no forejudger shall be entered for want of appearance; if the action be laid in London or Middlesex, and the attorney resides within twenty miles of London, until four days after notice in writing of filing such bill be given to such attorney, or his agent, or left at his usual place of abode, and a rule given for such appearance as usual; and if such attorney resides above twenty miles from London, or the action be in any other county than London or Middlesex, no forejudger shall be entered till eight days after such notice shall be given, in manner as afore said, and a rule to appear; the said days to be exclusive of the days of giving such notice.”

Rule Hil. 11 G.
2. as to giving notice of filing bill.

The notice of a bill being filed :

Common Pleas,

A. B.

against

C. D. gentleman, one of the attornies, &c.

Form of such notice.

Take notice that a bill was this day filed in the prothonotary's office of his Majesty's court of Common Pleas at Westminster, against you the defendant, C. D. at the suit of the plaintiff A. B. in an action of trespass upon the case upon several promises, (or whatever it is,) and unless you appear to the said bill on Wednesday the twenty seventh day of November instant, you will be forejudged the court.

23d Nov. 1795.

O. P. Attorney for
the Plaintiff.

To C. D. the defendant.

Before the above rule for giving the defendant notice, the plaintiff did nothing more than have him called by the cryer in court, which was then thought sufficient, as all attornies were supposed to be personally present during the sitting of the court; but many of the attornies having been struck off the roll on forejudgers for want of other notice, and many living at a distance, so that it was impossible to give orders for an appearance in time before the expiration of the rules to appear, the above rule became necessary. Bar. 41.

Reason of the above rule.

If the defendant appears in time, which is done by entering appearance with prothonotary, you deliver a declaration. How if defendant appears.

decla-

How if he does
not appear, and
herein of the
forejudger.

declaration and proceed as in other cases according to the practice of this court, and which has been already shewn in former volume; only let all the writs, as *venire*, *habeas corpus*, &c. be made returnable on a day certain in term, not on general return days*; but if he does not appear, he must be *forejudged*, that is, struck off the roll; to effect which, the plaintiff enters his bill, and a forejudger on the roll in the following form, beginning with a memorandum as in suits by bill in B. R.

Form thereof.

“ Middlesex, to wit. Be it remembered that on the
“ day of in this same term,
“ A. B. came here into court, by T. S. his attorney, and
“ exhibited to the Justices of our Lord the now King
“ of the Bench here, his bill against C. D. gentleman,
“ one of the attornies of the court of our said Lord the
“ now King of the Bench here, present here in court
“ in his proper person, in a plea of trespass on the case;
“ the tenor of which said bill followeth in these words;
“ (to wit,) To the justices of our Lord the King of
“ the Bench. Middlesex, to wit. A. B., by T. S. his
“ attorney, complaineth of C. D. gentleman, &c. (the
“ whole bill to) and thereupon he prayeth relief, &c.

“ Pledges for prosecuting, { John Doe,
and
Richard Roe.

“ Whereupon the said C. D. being solemnly called,
“ came not, therefore he standeth forejudged from ex-
“ ercising his office of attorney of this court, for his con-
“ tumacy, &c.”

How to proceed
against him after
forejudger.

Docket the roll with prothonotary, pay him 2s. for signing the forejudger, and the clerk of the warrant 1s. 4d. for striking the defendant off the roll, and then you may proceed against him *de novo*, as against a common person, either by arrest or not, as the action may be.

* The reason why process both for and against an attorney is made returnable on a day certain, is, because of his daily attendance in court; but if he does any thing to make him out of court as if he be nonsuited, he may be taken on a *ca. sa.* for the costs upon the judgment of nonsuit, returnable on a general return. *Parrot one*, &c. 2 Hale. 3 Wil 58.

When

When once an attorney is forejudged, the suit by bill is at an end, and the plaintiff if he proceeds, must proceed as against an indifferent person, by original and *capias* in the common way, Bar. 43; and so must every other person who sues him. *Vincent v. Willoughby*, *Farrill v. Head*, Bar. 41. for there cannot be a second forejudger.

By original or *capias* as against a common person.

An attorney forejudged, may be restored on clearing himself from his contumacy, in not appearing when he was called, and on making satisfaction to the plaintiff, which must be by paying debt and costs, and then a judge will make an order to the clerk of the warrants to replace him in the proper roll of attornies.

On what terms an attorney may be restored after forejudger.

However doubtful the practice might formerly have been, *Camelford v. Price*, Doug. 312.; *Lane v. Wheat*, *Ib.* 313; it is now settled that attornies may be sued in vacation, as well as other defendants. *Wayborne v. Fields*, 5 D. & E. 173.

Attorney may be sued in vacation in K. B.;

And the bill may be filed as of the term preceding. But if the cause of action really accrues in the vacation, in order that the bill may not appear to have been filed previous to the cause of action, and so occasion an incongruity upon the record, the bill should in such case be filed with a special memorandum, thus —

and bill filed as of preceding term

“ Michaelmas term, &c. Be it remembered, that on the 14th day of December 1792, (a day after the cause of action accrued), *A. Dodsworth* brought into the office of the clerk of the declarations of this court, according to the course and practice of the court, his certain bill against *W. Bowen*, gentleman, one, &c. and filed the same bill as of Michaelmas term, in the 33d year of the reign, &c. which said bill follows in these words, &c.” 5 T. R. 327.

With special memorandum if cause of action accrued in vacation.

But qu. Whether this practice is permitted in the Common Pleas, or whether the bill must not be filed in term time in that court. Imp. C. B. 569.

Q. as to C. B.

OBSERVATIONS.

14. On the Privilege of Attornies, &c.

15. On the Privilege of other Officers of Courts, &c.

The nature of the privilege of attornies.

The privilege of an attorney is not so much a personal privilege, as the privilege of the court to which he belongs, and is instituted for the sake of the suitor, that the attorney in the cause shall not be drawn away from the court which it is his duty to attend. He therefore is not to be arrested, being supposed to be always present in court, and amenable to their judgment. He is to be sued by bill, (the only proper proceeding against officers of the court,) and is entitled to sue by attachment (the court's own peculiar process). He may also lay the *venue* in Middlesex, let the cause of action arise where it may, that he may not be drawn from the courts at Westminster, where his attendance may be required; for this privilege as to the *venue*, see vol. I. ch. 6. sec. 2. D.

Extends to actions under 40s.

Such is the general privilege of attornies when plaintiffs or defendants, let the cause of action be what it may, *Camerford v. Price*, Doug. 313.; and though the amount of the debt be under 40s. for they are not subject to the jurisdiction of the county court, *Wiltshire v. Lloyd*, Doug. 381. *Gardner v. Jessop*, 2 Wil. 42.; or the defendant be a member of the university and privileged to be sued there. *Jolliff v. Lampton*, Ld. Ray. 342.

Or where defendant is a member of university.

When privilege is taken away.

But in many cases this privilege is taken away, as when the reason for which it is granted fails.

If he be not a practising attorney.

Thus, if he be not a practising attorney; and he must have practised, unless hindered by illness, within a year; the name continuing on the roll is nothing. *Mayer of Norwich v. Berry*, Bur. 2109.

If defendant, at the king's suit.

Or if he be defendant at the King's suit, 2 Rol. Ab. 274.

But

But *qui tam* actions are not considered the king's causes. *Britton v. Teafdale*, Bar. 48.

Otherwise in a *qui tam* action.

Or if the plaintiff cannot have his remedy in the court where he is attorney, as in actions real against an Attorney of K. B. Saun. 67.

Or if plaintiff would be deprived of his remedy in the attorney's court.

Or in an appeal against an attorney of C. B. *Ib.*

Or on a foreign attachment in sheriff's court in London. *Ib.* Comb. 427.

So, where he sues or is sued in *auter droit* as executor, *Ld. Ray.* 533. 2 Sal. 4.; or administrator, 12 Mod. 316.

If plaintiff or defendant in *auter droit*.

Or when he joins or is joined in any action with another, *Vent.* 298. *Dyer* 277.; for all or none must have privilege; as if he sues with his wife in right of his wife, *Ld. Ray.* 1398.; or the action be against him and his wife.

If he sues or is sued jointly.

So, if he be actually in the custody of the marshal, he shall only be sued in K. B. Str. 191.; and cannot plead his privilege, 2 Roll. Ab. 232.; for there is a great difference between an actual and supposed custody. Sal. 1.

If actually in custody.

If an attorney of one court sue an attorney of another, he may proceed by attachment of privilege in his own court, nor can defendant plead his privilege; for in such case where there is privilege of one court against privilege of another, the court which is first possessed of the cause, shall retain the jurisdiction of it. *Danser v. Barryman*, Blac. 1325. *Shorter v. Parkhurst*, Blac. 19.

Of privilege where both parties are attorneys.

But if plaintiff and defendant are both attorneys of the same court, defendant must be sued by bill, and plaintiff cannot take out an attachment and hold defendant to bail, as in the case of a common person.

This therefore is an exception out of the general rule, that privilege takes away privilege. *Ratcliff v. Besley*, Str. 1141. *Saunders v. Cokay*, Bar. 44.

An

Attorney may waive his privilege.

An attorney may waive his privilege either when plaintiff by suing as a common person, or when defendant, by not claiming it in a proper time, or in a proper manner. 2 Blac. 1088.

Or the irregularity if sued as attorney, when he ought not to be.

If an attorney, executor, or administrator, is sued by bill of privilege, he cannot object after appearance, for the fault is cured by appearance. Bar. 167. Sed Q. if shewn for cause of demurrer.

What shall be deemed a waiver.

Defendant, an attorney of C. B. was sued in B. R. by bill of privilege; plaintiff supposing him an attorney of that court, judgment went by default, and plaintiff staid two terms in hopes of receiving his debt, and then gave notice of executing a writ of inquiry; whereupon defendant moved to set aside the proceedings as irregular. But the court on shewing cause discharged the rule, and held that by laying by so long, he had waived his privilege. *Hern v. Howard*, 3 Blac. Rep. 231.

One attorney of C. B. sued another attorney of C. B. by *capias*, and the defendant moved to stay the proceedings, insisting he ought to be sued by bill. It appeared that the defendant had obtained a judge's order for time to put in bail; but this was held not to be a sufficient waiver of his objection to the plaintiff's method of proceeding against him, and the rule was made absolute to stay proceedings with costs. Bar. 53.

An attorney having been arrested was bailed, and another action being brought against him in the same court, he pleaded his privilege, and it was adjudged that putting in bail to the first action did not discharge his privilege. Carth. 377.

How in declarations by the bye against an attorney.

An attorney of C. B. was arrested at the suit of an attorney of B. R. and gave bail; and then B. delivered a declaration *by the bye* against him as in custody of the marshal, to which he pleaded his privilege, and resolved that though he be in custody of the marshal at the suit of A. yet when A. declares against him he may plead his privilege, because he comes here by coercion, and had no opportunity before to take advantage of it. 2d. That although he files bail at the suit of A. and in the same term a declaration is delivered against him

at the suit of B. yet the defendant may plead his privilege against B. as well as against A.; for it were absurd that B. who tops his suit upon the action of A., should have more liberty or advantage against the defendant than A. himself had. But if the defendant waives his privilege in the first action, he is then obnoxious to the suits of every body, notwithstanding his privilege. 3d. That if after the defendant has waived his privilege, he shall yet plead it; the plaintiff in his replication must shew the defendant's waiver, and rely upon the estoppel. *Ld. Ray. 135. Wil. Rep. B. R. 306. Sal. 1.*

If an attorney of the same court in which he is sued, be arrested, he may be discharged on motion; but if he be attorney of another court, he must find bail, and sue out his writ of privilege, and plead it in abatement, *When an attorney can be discharged on motion, and when not.* *Mayor of Basingstoke v. Bonner, Str. 864. Snee v. Humphreys, 1 Wil. 306.*; for by the mere production of the writ of privilege to the sheriff, having arrested defendant, an attorney of K. B. on process out of C. B., is not entitled to his discharge, but must plead the writ, *sub pede sigilli. Croftsley v. Shaw, Blac. 1085.*

But if the arrest was on process, out of an inferior court, the writ should be allowed *instantly*, and an order made for his discharge. *Ib.*

How to sue out Writ of Privilege.

Ingross writ on 2s. 6d. stamp; get a certificate from master's clerk in B. R. or clerk of warrants in C. B., that defendant is an attorney of the court; which certificate is an authority for signer of writs in B. R. or prothonotary in C. B. to sign same; pay nothing for signing; sealing 7d.; carry it to the clerk of papers of inferior court, the judge will allow it, and order defendants discharge. *Of the writ of privilege.*

The form of the Writ of Privilege is as follows:

George the Third, &c. To the judges of our court of our palace at Westminster, and to every of them greeting: Whereas, according to the custom of our court

(of the bench *or* before us) at Westminster, hitherto used and approved of in the same, the attornies of the same court (of the bench *or* before us), whilst they are prosecuting or defending suits and actions therein, for their clients, ought not, nor have they from time immemorial, been used to be compelled to answer before any of our justices or officers, or any other secular judges whatsoever, upon any pleas, complaints, or demands, which do not particularly belong to us (pleas of freehold, felonies, and appeals excepted), save only before (our said justices of our said court of the bench; *or* thus, before us by bill exhibited, in our said court before us, and not by writ): and whereas we have lately received information by the complaint of A. B. gentleman, one of the attornies of our said court (of the bench *or* before us), that several ill-disposed persons, intending to disquiet the said A., have issued forth and prosecuted out of our court, of our palace at Westminster, one or more writ or writs returnable, before you in the same court; or one or more precept or precepts returnable in our said court, before you or one of you, against the said A., and threaten to arrest and detain him in your custody thereupon, in suits which do not relate to us (or in pleas of freehold, felonies, or appeals excepted); whereby the said A. B. is unable to attend his said office as an attorney upon several affairs and suits depending in our said court (of the bench *or* before us): which, if it is permitted, will manifestly take away, and be not only in derogation and diminution of the jurisdiction of our said court (of the bench *or* before us), and the liberties and privileges thereof, but also to the great detriment of the said A. and his clients: and because we are willing that the jurisdictions, privileges, and customs, for so long time used and approved in our said court (of the bench *or* before us), should be inviolably kept and observed: We command you, and every of you, that you desist from taking the said A. B. into your custody, upon any writ or writs, precept or precepts; and if the said A. B. be detained in your custody, by any writ or writs, precept or precepts, other than such as particularly concern us (pleas of freehold, felony, and appeals, only excepted), that then you discharge the said A. B. out of your custody, and suffer him to go at large, as you will answer the contrary at your peril; and that you inform the

the party or parties, plaintiff or plaintiffs in the plaint or plaints, that he, she, or they may prosecute his, her, or their action or actions, suit or suits (in our court of the bench or before us) by bill, to be exhibited (to our justices of the said bench, or to us in our said court before us) at Westminster, against the said A. B. if he, she, or they, shall think it expedient so to do. Witness, &c.

No advantage can be taken of an erroneous writ of privilege (on error brought) upon the bare recital in the record; but the writ itself ought to be before the court by *certiorari*. *Ld. Ray. 1398.*

How advantage to be taken of an erroneous writ of privilege.

B. Of the Privilege of other Officers of the Courts, &c.

All the officers in the Court of King's Bench, as well as the attornies, have the privilege of suing by attachment, and being sued by bill, in actions by and against them, in their own right, and where they are not joined with others, except in pleas of land, of which the Court of Common Pleas alone has jurisdiction.

Of the privilege of other officers of the court.

But the officers of the Common Pleas, amongst whom are the serjeants, prothonotaries, secondaries, clerks of the prothonotaries, serjeants, clerks, clerks of the judges, &c. have not the privilege of being sued there by bill as attornies have, but only the privilege of being sued there in every suit (except appeals) by original writ, because they are supposed not to be always present in person in court as attornies are. *Baker v. Swindon, Ld. Ray. 399. 3 Sal. 283. 1 Bar. 280. Holt. 589. Adj. P. 6 W. & M. C. B. Windford. Rot. 685. Baker v. Duncalf, 3 Lev. 398. Windmill v. Cutting, Str. 191.*

Of the officers of C. B.

But it was agreed in Serjeant Scroggs's case, that the privilege of C. B. which serjeants claimed, extended only to inferior courts, and not to the Courts of Westminster Hall, and that he may be sued in either of these, because he is not confined to that court alone, but

but may practice in any other court. 3 Sal. 280. 1 Mod. 298.

But it is otherwise as to attornies or filazers, who cannot practise in their own name in any other court, but such as they respectively belong to; and that therefore a serjeant at law, is to be sued by original, and not by bill of privilege. 2 Lev. 129. 3 Keb. 424. 4 Mod. 226. So of the servant of a serjeant at law. Cro. Car. 84.

Defendant pleaded his privilege as a serjeant with a writ annexed: but for want of an affidavit that he had business in C. B. and there only, the court set it aside. *Stiles v. Mead*, Str. 738.

Of judges.

The judges have privilege of being sued in their own court. 3 Leon. 149.

But if the Chief Justice of the King's Bench or Common Pleas, bring an action there, the *placita* must be before the other three judges, omitting the chief, *Ld. Ray*. 778.; otherwise it would be erroneous, 8 Hen. 6. 81. Sal. 398.

Per Holt—Privilege is either of court or of process; persons belonging to the court as attornies, &c. have the privilege of court; that is, of being sued there and not elsewhere. But none shall be allowed the privilege of process, but those who are officers of the court, and are supposed to be always there. 3 Sal. 283.

Of the six clerks in chancery.

To an action in the King's Bench, defendant pleaded that he was one of the six clerks in chancery, and ought to be sued there. Replication that he never attended and acted as such; the fact on trial was, that he did all the business by deputy. *Per Lord Kenyon*: though it is to be lamented that these clerks do not personally attend, yet such absence is not sufficient to deprive him of his privilege. *Spencer v. Shepherd*, *Sittings in Trinity Term* 1795.

Privilege not lost by executing office by deputy.

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SECTION III.

Of Proceedings against Prisoners.

So watchful is the legislature over the liberty of the subject, that although on the one hand from an anxiousness to assist the industrious creditor in the recovery of his just demand, the person of the debtor, as we have already shewn, is made liable to imprisonment where the debt is above 10*l.* provided sufficient bail cannot be found; yet from a fear of his confinement being unnecessarily prolonged, the plaintiff is compelled to proceed against such prisoner with all due expedition, and is confined by certain regulations and restrictions, which if not adhered to, the defendant is entitled instantly to his discharge.

Proceedings against prisoners governed by particular regulations.

In proceedings against prisoners, therefore, the utmost caution and circumspection should be exercised, more especially since, if the defendant be discharged by any omission or neglect of the plaintiff's attorney, though perhaps only from an error in judgment, he will be rendered liable to make satisfaction to his client. *Russel v. Palmer*, 2 Wil. 325.

Attornies answerable to their clients for not observing them.

The defendant when a prisoner on *mesne* process must be in custody either of the sheriff in some county gaol, or of the marshal of the King's Bench, or warden of the Fleet, and this must be at the suit either of the plaintiff himself, or some other person; in order therefore to render these proceedings (which are apt to perplex the young practitioner) plain and intelligible; we will consider each of these cases in their order:

A. Of declaring against Prisoners.

- 1*st.* *When in Custody of the Sheriff (not of the Marshal or Warden) at the Suit of Plaintiff.*
- 2*d.* *When in Custody of the Sheriff at the Suit of another Person, and Plaintiff wishes to declare against him.*

3d. *When in Custody of the Marshal or Warden at the Suit of Plaintiff.*

4th. *When in Custody of the Marshal or Warden under a prior Commitment at the Suit of another Person or at Suit of same Plaintiff, but for another Cause of Action.*

5th. *Of declaring by Original.*

6th. *Of the Time of declaring.*

B. Of the Plea, and when Prisoner must plead, &c. or Plaintiff be entitled to Judgment.

C. Of the subsequent Proceedings of Plaintiff to Trial and Execution.

D. How to charge Prisoner in Execution.

1st. *If in Custody of Sheriff.*

2d. *If in Custody of Marshal or Warden.*

E. Of the Superfedeas; when Prisoner entitled to it, and how obtained.

F. Of Proceedings by and against Prisoners, having removed themselves after being charged with Process.

II.

A. Of Declaring against Prisoners.

The mode of declaring depends upon the following circumstances,

1st. In whose custody defendant is; whether in the custody of the sheriff, or of the marshal or warden.

2dly. At whose suit defendant is in custody; whether at the suit of plaintiff himself, or under a prior commitment at the suit of another person.

1st. *Of declaring against Defendant in Custody of the Sheriff at the Suit of Plaintiff.*

Of proceeding
against prisoner
in custody of
sheriff.

When defendant cannot find bail upon being arrested at plaintiff's suit he must go to the county gaol; and if he

he be not removed by *habeas corpus* into the prison of the court, (*i. e.* Marshalsea or Fleet,) plaintiff may declare against him in the custody of the sheriff.

By 4 & 5 W. & M. c. 21. it is enacted, "That where any defendant or defendants be taken or charged in custody at the suit of any person or persons, upon any writ or writs out of any of the said courts at Westminster, and imprisoned or detained in prison for want of sureties for their appearance to the same, the plaintiff or plaintiffs in such writ or writs, shall and may by virtue of the said act, *before the end of the next term after such writ or process shall be returnable*, declare against such prisoner or prisoners in the respective court or courts out of which the writ or writs shall issue, whereupon the said prisoner or prisoners shall be taken and imprisoned or charged in custody, and shall and may cause a true copy thereof to be delivered to such prisoner or prisoners, or to the gaoler or keeper of the prison or gaol, in whose custody such prisoner shall be or remain; to which declaration or declarations the said prisoner or prisoners shall appear and plead; and if such prisoner shall not appear and plead to the same, the plaintiff or plaintiffs in such cases shall have judgment in such manner as if the prisoner or prisoners had appeared in the said respective courts, and refused to answer or plead to such declaration."

Of the stat. 4 & 5 W. & M.

Plaintiff may declare against prisoner in custody of the sheriff.

When.

To which declaration prisoner must plead.

And by sect. 3, it is further enacted, "That in all declarations against any prisoner or prisoners, detained in prison by virtue of any writ or process issued out of the court of King's Bench, it shall be alleged in custody of what sheriff, bailiff, or steward of any franchise, or other person having the return and execution of writs, such prisoner or prisoners shall be at the time of such declaration by virtue of the process of the said court at the suit of the plaintiffs; which allegation shall be as good and effectual to all intents and purposes, as if such prisoner or prisoners were in the custody of the marshal of the Marshalsea of our Sovereign Lord," &c.

The declaration in K. B. must state in whose custody such prisoner is.

Before the making of this statute, the plaintiff in every action in order to declare against the defendant, a prisoner, was obliged to bring him into court by writ of

How the practice was before this statute.

habeas corpus, which being attended with great expence and much inconvenience gave rise to the act.

How to declare.

B. R.

If suit be by bill file copy of declaration ingrossed on treble 1d. stamp parchment with clerk of declarations, make three other copies thereof on treble 1d. stamp paper, deliver one to gaoler or turnkey, or to the prisoner himself; annex another copy to an affidavit of such delivery or service, which must be made and sworn before a judge in town or commissioner in country; and annex the third copy of declaration to an office copy of such affidavit; carry them to clerk of rules who will keep the original affidavit and declaration thereto annexed, to file, and will examine your office copy of affidavit, and mark thereon the day of filing affidavit, and also the rule to appear and plead. R. East. 5 W. & M.

N. B. In this court where the process is by bill, declaration must state in whose custody defendant is, and also that he is so in custody at the suit of plaintiff. Ld. Ray. 1362.

C. B.

Make only two copies of declaration on treble 1d. stamp paper; take them to prothonotary to get them entered; pay for entries thereof; deliver one to turnkey, asking him at same time if defendant is a prisoner at suit of plaintiff; or to prisoner, and annex the other to an affidavit of such delivery, which must be made, sworn, and filed with the declaration annexed with the secondary; upon which, but not till then, he will give a rule for defendant to appear and plead. R. East. 5 W. & M.

There is no occasion as in B. R. to state in declaration that defendant is in custody of sheriff or at whose suit, that section of the stat. being confined to B. R.

How declaration must be delivered.

Upon the above statute it is to be observed, that the declaration must be delivered personally to the prisoner or gaoler, of which the rule requires an affidavit containing the time when, and person to whom it was delivered.

When in C. B. declaration must be entered with prothonotary.

It has been held in C. B. that a declaration against a prisoner in a county gaol need not be entered with the prothonotaries before the delivery, but before it is filed with

with the secondary it must ; which means any time before rule to plead given. *Strickland v. Hodgson*, Cooke's Rep. 114. Barnes, 372. S. C.

If a defendant is in the custody of the sheriff, and the plaintiff has declared against him as in such custody, he may notwithstanding, if he thinks proper, remove the defendant into the custody of the marshal, by *habeas corpus ad faciendum et recipiendum*; for the act 4 & 5 W. & M. was only made for the ease and benefit of plaintiffs, to save them the trouble and expence of suing out an *habeas corpus* to bring the defendant into court, and does not take away the plaintiff's common law right to remove him. Dr. *Bettesworth* and *Bell Esq.*, 4 Burr. Rep. 1875.

The statute of William does not take away plaintiff's common law remedy.

But such *habeas corpus* must be tested in term, though it may be returnable immediately.

2d. *Of declaring against Defendant in Custody of Sheriff at the Suit of another Person, or at Suit of same Plaintiff, but for another Cause of Action.*

Where defendant is already in custody of any sheriff at the suit of another person, plaintiff may either remove him by *habeas corpus* into the prison of the court, (*vide post*, tit. *Habeas Corpus*,) or he may charge him with the action in the custody of the sheriff.

How to charge Defendant (already in Custody of the Sheriff) with a fresh Action.

If your action be notailable, serve defendant with copy of process; and if he do not appear thereto accordingly, file common bail, or enter an appearance for him, according to statute, and proceed in the usual way.

If in custody at the suit of another person.

But if your action beailable, make affidavit of cause of action, and sue out writ as in other cases, which must be left at sheriff's office for sheriff to charge such defendant in custody therewith; pay 2s. 4d. Then file your

your bill, deliver declaration, and make copies thereof, as *ante*, p. 88.

If in custody at suit of same plaintiff, but for another cause of action.

But should the same plaintiff have several causes of action, or should other plaintiffs institute suits against such prisoner, whether it be by detainer of the person, or for a cause not requiring special bail, the proceedings in such suits must be commenced by the like process as if the defendant were at large, and not by delivering a declaration in the first instance, as is the proper way of proceeding against a prisoner in custody of the marshal, who being always in court, requires no process to bring him thither. *Robertson v. Douglas*, 1 T. R. 191.

How declaration to be delivered.

The declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff, for the same cause of action. *Robertson v. Douglas*, *ib.* 191.

3d. Of declaring against Defendant in Custody of Marshal or Warden at Suit of Plaintiff,

B. R.

Of proceeding against prisoner in custody of marshal or warden.

If defendant be in K. B. prison in custody of marshal, file bill as before on treble 1d. stamp parchment with clerk of declarations, make only one copy thereof, which deliver to turnkey, or to prisoner. No affidavit of such delivery on service need be made, but give a rule to plead, &c. as in other actions.

C. B.

If defendant be in the Fleet, make two copies of declarations on treble 1d. stamp paper; carry them to prothonotary's, who will mark and enter them, then deliver one to turnkey, asking him if defendant is his prisoner at plaintiff's suit; or to prisoner, and annex the other to affidavit of such delivery, and file it with secondary, who will give a rule thereon for defendant to appear and plead.

When the prisoner is in the Fleet, the declaration must be entered with the prothonotaries, before it be delivered to the defendant. *Cooke's Rep.* 114.

4th. Of

4th. *Of declaring against Defendant in Custody of Marshal or Warden, at Suit of another Person.*

If your action be notailable, serve defendant with copy of process, and if he do not appear thereto accordingly, file common bail, or enter an appearance for him according to statute, and proceed in the usual way.

But if your action beailable, and you wish to detain defendant in custody upon it, the following rule is to be observed :

B. R.

It is ordered, that from and after the last day of this term, no declaration, whereby any prisoner shall be charged in the custody of the marshal, shall be sufficient cause of detaining such prisoner in custody, unless an affidavit, that the plaintiff's cause of action against such prisoner does amount to 10l. or upwards, shall be first made and filed with the clerk of the rules of this court, and the sum specified in such affidavit shall be indorsed by him upon such declaration, before the leaving thereof with the turnkey. East. 15 Geo. 2.

File bill, make affidavit of debt, take copy of bill on treble 1d. stamp with affidavit to clerk of rules, who will indorse declaration according to above rule; serve it as abovementioned on turnkey or defendant, and proceed as before directed.

C. B.

It is ordered, that no copy of a declaration delivered at the Fleet prison against any prisoner there, shall be sufficient charge to hold such prisoner to bail, or to retain such prisoner in custody for want of bail, unless an affidavit, that the plaintiff's cause of action amounts to 10l. or upwards, be first made and filed in the prothonotary's office, and an indorsement made by the said prothonotary or his deputy upon such copy of a declaration, signifying the sum of money specified in such affidavit, for which sum so indorsed, bail shall be required, and no more. Hil. 8 Geo. 2.

Make two copies of declaration as before directed, and having got one marked by prothonotary according to rule, proceed as before.

The declaration indorsed by clerk of rules, or marked by prothonotary, must be delivered, and not a copy. *What declaration must be delivered.*
Newhall v. James, P. R. 331. Burr. 1052.

How

How if in vacation time.

B. R.

To charge a prisoner in custody of the marshal in vacation time (instead of the old method of suing out an habeas corpus ad respondendum tested as of the last term) the plaintiff must file a bill of the preceding term, and then deliver or leave for the defendant in custody a copy of the declaration as of the preceding term, and make an affidavit of the delivery thereof. Burr. 47. 1052.

C. B.

To charge a prisoner in the custody of the warden of the Fleet in vacation time, the plaintiff draws his declaration as of the preceding term, gets it stamped by the protobonotary, and delivers or leaves it with the clerk of the papers.

5th. Of declaring when Proceedings are by Original.

Of proceedings
by original.

If defendant is in custody of any sheriff, &c. upon a special *capias*, then you declare against him by delivering a declaration only, on treble *id.* stampt paper, thus:

Surry, to wit. Richard Fenn, late of, &c. yeoman, was attached to answer John Denn, in a plea of trespass on the case, and whereupon the said John Denn, by T. S. his attorney, complains, that whereas (as in other cases). You do not allege by original, in whose custody he is; but affidavit of the service is required, and you proceed the same as by bill afterwards.

If in custody of the marshal, declare against him in the same manner, and do not allege him to be in the custody of the marshal.

6th. Of the time for Declaring against Prisoners.

B. R.

That no copy of a declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged in custody. East. 5 W. & M.

C. B.

No copy of a declaration shall be delivered to any prisoner, until after the process upon which such prisoner shall be taken or charged in custody be returnable.

Rule as to time
of declaring.

It is ordered, "That from and after the last day of this term, in all cases where a prisoner is or shall be taken, detained, or charged in custody by *mesne* process hereafter returnable, issuing out of this court, and the plaintiff shall not cause a declaration against such prisoner, to be delivered to such prisoner, or to the gaoler or turnkey of the gaol or prison where such prisoner is, or shall be detained or charged in custody, *before the end of the next term, after the return of the process, by virtue whereof such prisoner is, or shall be taken, detained, or charged in custody*; and (unless the prisoner is or shall be in custody of the marshal) cause an affidavit to be made and filed with the clerk of the rules of this court, of the delivery of such declaration, and of the time when, and the person to whom the same was delivered, before the first day of the next term, after the delivery of such declaration, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted by this court, or one of the judges thereof, upon filing common bail, unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary: and in case of a commitment, or surrender to the marshal, in discharge of bail, after the return of the process, and before a declaration delivered, unless the plaintiff shall cause a declaration to be delivered as aforesaid, *before the end of the term next after such commitment or surrender shall be made, and due notice of such surrender given*, the prisoner shall be discharged out of custody by writ of *superfedeas*, to be granted as aforesaid upon filing common bail; unless, upon notice given to the plaintiff's attorney, good cause shall be shewn to the contrary." Hil. Term, 26 Geo. 3.

Of the last rule
26 Geo. 3.

By this rule (which comprehends the several stages of a suit on the part of the plaintiff) a prisoner becomes superfedable in the following cases; unless good cause be shewn to the contrary, viz.

Explanation of
above rule.

1st. If the plaintiff do not declare before the end of the term next after the return of the process, whereupon the prisoner may have been arrested.

As to time of
declaring.

2dly. Although the plaintiff declare in due time, yet if he do not make, and file with the clerk of the rules,

As to filing af-
fidavit with
clerk of rules.

and when not
necessary.

rules, an affidavit of the delivery of his declaration, containing the time when, and persons to whom the same was delivered, before the first day of the next term after the delivery thereof, the prisoner becomes supersedeable; but it being unnecessary to make such affidavit if the defendant be in custody of the marshal, that case is excepted in the rule.

As to declaring
after a surren-
der, &c.

3dly. In case of surrender or commitment of a defendant to the custody of the marshal, after the return of the process, and before declaration, unless the plaintiff declare before the end of the next term after such commitment or surrender, and due notice thereof given, the defendant becomes supersedeable.

Or after an es-
cape.

If a prisoner on *mesne* process escape, and is retaken on an escape warrant, and in custody of the sheriff, &c. the plaintiff must declare against him within two terms after taken on escape warrant. Reg. 6 Ann. B. R. and the same practice in C. B. 1 Barnes, 285.

If a prisoner escapes, his recaption shall be looked on as the time of the render from whence the plaintiff is to proceed. Barnes, 382.

Otherwise, de-
fendant entitled
to supersedeas.

If plaintiff does not declare in time, the defendant is entitled to his *supersedeas*.

Exceptions as
to above rule.
In case of a trea-
ty of compro-
mise;

But if the delay was occasioned from any treaty of compromise between plaintiff and defendant, which afterwards broke off, defendant shall not be discharged; for it is for the prisoner's benefit that plaintiff listens to proposals of accommodation. 3 Wils. 455.

which must
now be in writ-
ing.

But now by same rule, 26 Geo. 3. it is ordered,
“ That no treaty or agreement, shall be sufficient cause
“ to prevent any defendant having the benefit of a
“ *supersedeas* for want of prosecution, unless the same
“ be in writing, signed by the defendant or his attorney,
“ or some person duly authorized by the defendant;
“ and it be therein expressed, that proceedings are stayed
“ at the defendant's request.”

Of the rule for
time to declare.

Generally speaking, the court will not grant plaintiff a rule for time to declare against a prisoner.

But

But where in a writ against three, one was arrested and lay in gaol, and the other two absconded, the court refused to discharge the prisoner, saying, that he must appear for all, or lie in gaol till the other two are outlawed; but in such case plaintiff must move for time to declare against him in custody. East. 12 Geo. 3.

Seldom granted in proceedings against a prisoner; except in cases of outlawry;

So, where in an action against two, and one defendant was committed to the Fleet, and charged with the action for want of bail, and the other absconded, so that the plaintiff was not able to bring him into court by arrest, and therefore took out process of outlawry against him, which unavoidably over-run the time for declaring, viz. the two terms; the court thought it reasonable, as the plaintiff could not declare against the other, he neither being outlawed, nor in court, to allow a further time to declare. Barnes, 401. But in such case the court will expect plaintiff to shew, that he has used all diligence to outlaw the other. Barnes, 396.

in which plaintiff must proceed with due diligence.

7th. *General Observations on the Declaration, and what Person in custody may be charged therewith.*

A declaration must be served on a prisoner, or left with the turnkey, though he has appeared by attorney. 2 Black. Rep. 786.

Observations as to the delivery of declaration.

And if a defendant is served with process, or arrested when at large, and becomes a prisoner in the Fleet before declaration, the declaration must be delivered to the turnkey. Barnes, 392.

To whom to be delivered.

As the delivery of a declaration against a prisoner to the gaoler is good, so is the delivery and service of every other proceeding and notice in the cause. *Whitehead v. Barber*, 1 Str. 248.

Where the defendant is in custody, the declaration must be delivered to the turnkey and not into the office, 4 & 5 W. & M. c. 21. *Greenhouse v. Cleever*, 1 Str. 474.

B. R.

B. R.

Gaoler must acquaint his prisoner therewith.

If any gaoler or keeper of a prison having received a copy of a declaration against any prisoner in his custody, shall suppress the same, and not deliver it forthwith unto such prisoner, an attachment shall be issued against him. *East. 5 W. & M.*

C. B.

If any gaoler or keeper of any prison having received a copy of a declaration against any prisoner in his custody, shall suppress the same, or not deliver it forthwith unto such prisoner, an attachment shall be entered against him.

How if declaration be irregular;

After an irregular declaration against a prisoner, the plaintiff cannot declare *de novo*, unless the prisoner is in custody at another person's suit. *Prac. Reg. 328.*

or plaintiff has mistaken his form of action.

Nor can he, if he has mistaken his form of action, or the capacity in which he ought to have sued, make a new affidavit and so declare against him. *Bar. 391. 397.*

What persons in custody are deemed chargeable with declaration as a prisoner.

Process may be served on a man in custody of the marshal, having surrendered himself to take the benefit of the act for relief of insolvent debtors. *Pry v. Lawford, 3 Geo. 2.*

Insolvent debtor. A person committed for contempt.

A prisoner, committed for a contempt, cannot be charged with a declaration without leave of the court. *Prac. Reg. 325.*

A fugitive who has surrendered.

A prisoner surrendering as a fugitive, cannot be charged with a declaration under this act, because not committed, *Prac. Reg. 126. 1 Bar. 281.*; but it seems he may be arrested, *ib.* and vide 2 *Black. Rep. 970.*; that a fugitive surrendering himself to the Fleet under the insolvent act, is not a prisoner in the custody of the warden, nor liable to be charged with a declaration.

One in custody on an attachment;

One in custody on an attachment, cannot be charged in execution without leave. *Prac. Reg. 825.* But it has been since held, that a person in custody, under an attachment for non-payment of costs, may be charged. *Bonafous v. Schoole, 4 D. & E. 316.*

or on a criminal account;

A prisoner in custody on a criminal account, cannot be charged with a civil action, without leave of the court. *Salk. 354.*

A person

A person attainted even of high treason, may be charged with a civil action by leave of the court. *Ramsden* and another v. *Macdonald*, 1 Wil. 217.

or attainted of high treason;

The court will not give leave to charge a prisoner with an action, who has a pardon upon condition of transportation, because it would defeat the effect of the pardon, and render the prisoner incapable of performing the condition on which he was pardoned. *Ld. Raym.* 848.

or a prisoner pardoned on condition of transportation;

But a prisoner on a charge of felony may be charged with a *latitat*. *Daintree v. Justice*, Hil. 9 Geo. 3.

or a felon.

If the defendant is in custody of any gaoler, &c. for felony, upon producing your affidavit (sworn before a judge) of the debt, the judge's clerk will give you an order to detain him; in this case affidavit is filed with Messrs. Provost and Webb, and sue out writ (or if bill of Middlesex, with Mr. Braithwaite) as in other cases; take the writ to the sheriff, and leave the order; pay 2s. 4d.

How to proceed in action against a felon.

A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the Fleet, though he be not there by compulsion. *Wilkinson v. Juques*, 3 T. R. B. R. 392.

How if a person be voluntarily resident within the walls of the Fleet.

B. Of the Defendant's Appearing and Pleading.

B.

B. R.

If the defendant is in custody of the sheriff, a rule to appear and plead must not be given before affidavit is filed of the delivery of the declaration, which affidavit must now be filed with the clerk of the rules before the first day of the next term after the delivery of the declaration. *By Reg.* Hil. 26 Geo. 3.

C. B.

The same practice in the Common Pleas, the affidavit being to be filed with the protobnotary. But if Easter term is the second term, then the affidavit of delivery must be filed within ten days.

Before rule to plead given, affidavit of delivery of declaration must be filed, if defendant in custody of sheriff.

But if the defendant is in the custody of the marshal, no affidavit
Vol. II.

But if defendant is a prisoner with the warden, no affidavit
H of

Not otherwise.

When declaration must be delivered to have a plea of that term.

dwit of delivery is necessary, but a rule to plead may be given of course. And if the declaration is delivered four days exclusive before the end of term, and the rule given and plea demanded, (which must be done on the back of the declaration,) the defendant must plead as of that term. But if the bill is not filed, and copy delivered four days exclusive before the end of the term, the defendant may imparl till the next.

If process is returnable the first day of Easter or Michaelmas term, and the declaration be delivered before menssem pasche or the Morrow of All Souls, and affidavit thereof filed, the defendant must appear before ten days after Easter or Michaelmas term; and if he appears within that time he may imparl till the next term, unless the action is in London or Middlesex, and defendant is in prison within 40 miles of London, and then though he appears within that time he must plead two days before the effoin day of that subsequent term. Reg. East. 5 W. & M.

If the declaration be delivered on or after menssem pasche or Morrow of All Souls, or in Hilary or Trinity, and rules given, if defendant appears two days before the effoin day of the next term he shall imparl till the next term; but if he does not appear within that time, the plaintiff is entitled to judgment.

of delivery is necessary; and in such case the rule to plead is out in eight days inclusive.

If defendant is in a common gaol, and the declaration is delivered before the effoin day of the term, the rule is out in four days.

In Easter and Michaelmas terms, if the declaration is delivered before menssem pasche, or Morrow of All Souls, the rules to plead are out in ten days after the term, except the action is in London or Middlesex, and the defendant a prisoner within forty miles, as in B. R.

And in Hilary and Trinity terms if the declaration is delivered on or after the effoin day of the term, the rules to plead are out two days before the effoin day of the subsequent term. But if defendant appears within the time he may imparl as in B. R. East. 5 W. & M. and Vide 1 Barn. 150.

If the declaration is delivered before the effoin day of the term next after the return of the writ, the plaintiff in such next term

term may give rules, and the defendant must appear and plead on or before the expiration of the rules. East. 5 W. & M.

In case of a prisoner in the Marshalsea, demand of plea is necessary, but not so if defendant is in custody of the sheriff, 1 T. R. 591. When demand of plea necessary.

A prisoner may, any time pending the action, and before final judgment, file special bail, and justify same, and have a *supersedeas*, if in the custody of the sheriff; if in custody of the marshal by a judge's order only. Prisoners may in any state of the action put in bail and get discharged.

N. B. A justification in vacation before a judge, is sufficient upon notice.

If a defendant in custody, file his plea with the clerk of the papers, or enter it in the general issue book before any plea be due; for example, if the declaration be delivered so late in term that the plaintiff is not entitled to a plea until the following term, and yet the defendant voluntarily pleads in the same term, he must give notice thereof to the plaintiff's attorney, otherwise such plea will be a nullity. *Thomas v. Pritchard*, 4 T. R. 664. When prisoners must give notice of plea.

But in general a prisoner need not give notice of his having filed a plea; and what was said by the court in the above case, can only apply to cases where the defendant pleads out of time. In that case the defendant had a right to imparl until the next term: but he chose to file a plea in the same term, of which he gave no notice to the plaintiff. And if a defendant mean to avail himself of a plea which is filed before the time, when by the rules of the court he is compellable to plead, he must give notice of his plea. But in this case the defendant pleaded in the regular time, and therefore no notice of it to the plaintiff was necessary. *Rusholm v. Chapman*, 5 T. R. 474.

If the defendant does not plead (no demand is necessary) within the time, sign judgment, and give notice of inquiry to the prisoner or turnkey, and proceed against him

him as in other cases (excepting that he must be proceeded against to final judgment, within three terms). See *post* the rules East. 8 Geo. 1. and 26 Geo. 3.

But if you forget to sign your judgment on the first rule given to plead, you may in the next term give a fresh rule (no demand is necessary), and for want thereof sign judgment when the rule expires.

C. Of Proceeding against Prisoner to Trial and Execution.

Within what time plaintiff must proceed after declaration to trial and judgment.

In all cases after declaration delivered, unless the plaintiff proceed to trial on final judgment, within three terms after such declaration delivered, (if by the course of the court the plaintiff have it in his power so to proceed, and of which three terms the term wherein the declaration is delivered shall be accounted one,) the defendant becomes supersedeable.

How on a surrender after declaration.

In case of surrender in discharge of bail, after declaration delivered, unless the plaintiff proceed to trial or final judgment within three terms next after such surrender, and due notice thereof, (if, by the course of the court, the plaintiff have it in his power so to proceed, of which three terms the term wherein the defendant surrendered shall be accounted one,) the defendant becomes supersedeable.

Within what time to proceed to execution, after trial in general cases.

In all cases after trial had or final judgment obtained against any prisoner, unless the plaintiff cause such prisoner to be charged in execution within two terms next after such trial or judgment, (of which two terms the term wherein such trial shall be had, or final judgment obtained, shall be accounted one; in case no writ of error be brought, or injunction obtained; and in such case within the like space of time next after the judgment be affirmed, the writ of error *non-prossed* or discontinued, or the injunction dissolved, including the term of such affirmation, *non pros*, discontinuance, or dissolution,) the prisoner becomes supersedeable.

How in cases of writ of error or injunction.

In case of surrender.

In case of a surrender in discharge of bail had, or final judgment obtained, unless the plaintiff cause the defendant

defendant to be charged in execution within two terms next after such surrender, and due notice thereof, (of which two terms the term wherein such surrender shall be made shall be taken to be one, if no writ of error be depending, or injunction be obtained; and in such case within the like space of time next after the judgment be affirmed, the writ of error *non-prossed* or discontinued, or the injunction dissolved, including the term of such affirmation, *non pros*, discontinuance, or dissolution,) the prisoner becomes supersedeable. R. 26 Geo. 3. B. R. 8 Geo. 1. C. B.

For the better understanding of this rule, it may be proper to state the proceedings. If the declaration is delivered in Hilary term 1791, the plaintiff must sign final judgment the last day of Trinity term, and charge defendant in execution the last day of Michaelmas term (unless error or injunction). Construction of rule as to the time.

In country causes, and also in such as are tried at the sittings after term in London, and Middlesex, the two terms allowed a plaintiff for charging the prisoner in execution after trial, must be computed from the term wherein the *distringas juratorum* is returnable, inclusively to the end of the following term, after which the defendant will become supersedeable, if not charged in execution. Thus if a plaintiff proceed to trial at the Lent assizes, the defendant will become supersedeable immediately after the following Trinity term; or if at the Summer assizes immediately after the following Hilary term, if not previously charged in execution; but should a plaintiff proceed to trial at the sitting within term in London or Middlesex, the defendant must be charged in execution in the following term, or he will become supersedeable.

Although it become impossible for the plaintiff to proceed to trial within the time directed by the rule, yet the defendant is not supersedeable until three terms have fully elapsed. See rule and order K. B. 296.

Notice of trial to a turnkey good, in an action against a prisoner. Str. 248.

D.

D. How to charge in Execution.

If in Custody of Sheriff.

Having entered, docketed, and filed your judgment of record, sue out a *ca. sa.* as in other cases, and get warrant thereon, which lodge with the gaoler in whose custody defendant is.

If in Custody of Marshal or Warden.

B. R.

Get rule of clerk of rules for marshal to acknowledge defendant to be in his custody; serve same on marshal, who will make out such acknowledgment; apply to clerk of treasury for him to enter up final judgment on the roll; pay 2s.; make out committitur on slip of parchment unstamped; take it to the clerk of judgments, and file it with him, who will enter it on the roll; it is usual also to enter it in marshal's book at clerk of judgments. Defendant then stands charged in execution.

C. B.

Make out habeas corpus ad satisfaciendum on a 5s. stamp, get it signed by protobonary, pay 1s. 4d.; sealing 7d.; procure judge's fiat thereon, (4s.) take it to clerk of papers at the Fleet, four days before return thereof, pay 9s. 2d.; apply to clerk of treasury to enter final judgment on roll, pay 2s.; pay officer for bringing up defendant 10s. 6d.; crier 1s.; secondary 10s.

Q. If entry in Marshal's book necessary.

There is a book kept in the K. B. office, called the marshal's book, in which are entered the names of persons charged in custody previously to their being so charged. But this is a book of no authority, and only meant for the marshal's convenience, that he may readily see what persons are charged in custody; so that it is (in truth) only a memorial of the defendant's being charged in custody of the marshal, and not the cause or foundation of such charge and detainer. *Hutchins v. Kendrick*, 2 Burr. 1049. This has been adhered to in a late case before Lord Kenyon, and he held it not necessary on the master's certificate, and refused to discharge the prisoner for want of such entry.

Of entering committitur on record.

The committitur must be actually entered on record before the end of the second term, 2 Str. 1215. *Unwin v. Kerchoffe*, 4 Burr. 1841.

Defendant

Defendant discharged out of the custody of the marshal, because there was no acknowledgment by him of the defendant's being in custody in the term in which he was charged in execution. *Fisher v. Stanhope*, 1 Trin. Term, 464.

Of necessity of acknowledgment.

The plaintiff must give notice of his having abandoned a former *committitur* which is erroneous, before he enters a second, rectifying the mistake. *Topping v. Ryan*, 1 T. R. 227.

Of the notice of abandoning a committitur.

The plaintiff shall have every day in the second term to charge a prisoner, 2 Wil. 380. C. B.

The whole of second term allowed to charge prisoner.

The defendant a prisoner, applied to be discharged by *superfedeas* for want of being charged in execution within two terms after judgment. The plaintiff excused himself by the delivery of a *ca. sa.* to the gaoler, within due time. But the court held that to be insufficient. The *ca. sa.* ought to have been delivered to the sheriff, and the sheriff's warrant to the gaoler. Bar. 389. C. B.

What shall be deemed a sufficient excuse for not charging prisoner in execution in time.

If defendant, a prisoner, brings a writ of error, plaintiff has no need to charge him in execution the second term after the judgment, 2 Wil. 380. C. B.

If the plaintiff recover a judgment against two defendants in the King's Bench, and one of them bring error in the Exchequer Chamber, the plaintiff cannot charge the other defendant in execution, till the record be remitted into the court of K. B., notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants. *Laroche v. Waf-brough* and another, 2 T. R. 737.

How if judgment against two, and one brings error.

In such case where the judgment was affirmed in the Exchequer Chamber, and costs given of the writ of error, and both defendants were taken under writ of execution on the whole sum, including the costs of the writ of error, as well as the original sum recovered, this court permitted the plaintiff to amend his *committitur* in execution as to the defendant, who did not join in the writ of error, by altering it to the original sum recovered. *Ib.*

C. Of the Supersedeas.

If plaintiff do not declare and file affidavit of service of declaration, and proceed to trial, judgment, and execution, in manner and within the times limited by the rules of court as above respectively prescribed, defendant may obtain his discharge by supersedeas,

How to obtain Supersedeas.

1st. For want of Declaration,

If Defendant in Custody of Sheriff.

B. R.

Get certificate from gaoler of the causes he is charged with, and affidavit of gaoler's signing same; take out judge's summons to shew cause why writ of supersedeas should not issue for defendant's discharge; serve same on plaintiff's attorney; one summons only is necessary; if he neglect attending, make affidavit of such service and attendance on your part, and judge will make an order for supersedeas on defendant's filing common bail; take supersedeas to sheriff, who will discharge prisoner. Whole expence about 8s. 9d.

If by original, and defendant in custody of sheriff, get the order as above, file an appearance with the filaxer, and he will make out supersedeas; get it signed and sealed.

If in custody of marshal, he will certify to him as by bill.

C. B.

Get certificate from gaoler of the causes prisoner stands charged with; take out summons to shew cause why defendant should not be discharged for want of declaration; serve same on plaintiff's attorney, three summonses are necessary. If no attendance on either, make affidavit of services and of your own attendance.

Get judge's fiat, carry it to filaxer's who signed original writ, to be filed. Take supersedeas prepared and ingrossed with you, and filaxer will sign same, but you must first enter appearance with him as in a common case.

If

If Defendant in Custody of Marshal or Warden.

B. R.

If in custody of marshal go to clerk of papers in K. B. prison for a certificate of causes with which he is charged; take out summons, and on plaintiff's attorney not attending, judge will make order: or common bail being filed, and upon certificate thereof from clerk of common bails, marshal will discharge defendant without any superledeas.

C. B.

If in custody of warden apply to clerk of papers in Fleet for the causes defendant is charged with, then proceed by summons as before to obtain superledeas, which is always necessary in this court for defendant's discharge.

Formerly in obtaining the *superledeas*, it was necessary to get certificate from the clerk of the declarations if in B. R., or from prothonotary in C. B., that no bill or declaration were filed in that office against defendant, but that seems now unnecessary, 1 Str. 474.

Certificate from clerk of declarations unnecessary.

In all the above cases when common bail filed, or appearance entered, file memorandum of warrant according to 25 Geo. 3. c. 80.

2d. For want of Proceeding to Trial, Judgment, or Execution.

The manner of procuring defendant's discharge for want of plaintiff's proceeding to trial, &c. is very nearly similar to the mode above mentioned, according as prisoner may be in custody of sheriff, or of marshal, or warden, only the summons must be drawn agreeable to the fact, and three summonses in case of non-attendance will be always necessary. Also in C. B. *superledeas* must be signed by prothonotary, instead of filazer.

If a plaintiff do not proceed to trial or judgment within three terms against the defendant (a prisoner), the latter is not entitled to be discharged, until the expiration of the third term. *Thomas v. Prichard*, 4 T. R. 664.

Not entitled to discharge till expiration of third term.

OBSER-

OBSERVATIONS

On the Superfedeas—when Prisoners entitled to it—its effect, &c.

Plaintiff must proceed according to rules 26 Geo. 3. and 8 Geo. 1. or defendant will be discharged,

By the rules above-mentioned of 26 Geo. 3. in B. R. and 8 Geo. 1. in C. B., the particular times of proceeding are pointed out, and if plaintiff does not strictly adhere thereto, defendant will be entitled to his discharge by *superfedeas*, and the terms are always reckoned inclusive. *Davis v. Hale*, Bar. 279. *Huggins v. Bainbridge*, Bar. 383.

Except in certain cases.

But this is upon the supposition that the plaintiff is capable of proceeding within the time specified, for if by the act of the court or of the defendant himself, he should be prevented, no advantage by *superfedeas* is to be taken.

As when prevented from proceeding by an act of the court;

As if the court delay giving judgment on demurrer, or the like, or assize only held in the county once a year. *Huggins v. Bainbridge*, Bar. 383.

or writ of error;

Or defendant brings a writ of error, or files an injunction. *Garratt v. Mentill*, 2 Wil. 380.

or bad plea;

Or pleads a plea, found bad on demurrer. *Bibbins v. Mantill*, 2 Wil. 378.

But if he brings a writ and puts in bail, he may be discharged on *superfedeas*, Bar. 499, *Roe v. Whitehead*; for the bail will be liable.

or being obliged to outlaw a defendant;

So, if it be a joint action, and one defendant be a prisoner, and against the other plaintiff is obliged to proceed to outlawry, as he cannot declare till the latter be outlawed, he shall be excused for not proceeding against the former, but must take out rules from time to time, for time to declare, *Knight v. Parker* and another, Blac. 759.; and must also use all due diligence. *Tracy v. Garmston*, Bar. 296. *Linthwaite v. Biggs*, Bar. 398. *Williams v. Mainwaring*, Bar. 401.

So, if there be any treaty of compromise between plaintiff and defendant, this shall excuse. *Walter v. Stewart*, 3 Wil. 456. or by treaty of compromise;

But now by 26 Geo. 3. this compromise must be in writing.

Or if defendant has escaped after render, for then the time of recaption shall be deemed the time of render. *Mabson v. Butler*, Bar. 382. or escape of defendant.

But it is not an excuse for not charging in execution, that *ca. sa.* was delivered to gaoler in due time; it ought to be delivered to sheriff, and sheriff's warrant to gaoler. *Poole v. Cooke*, Bar. 389. But not by delivery of *ca. sa.* to gaoler.

When a prisoner is superseadeable, he should take advantage of it in due time; for although it is a rule that a prisoner once superseadeable is always so, yet that rule only holds so long as he remains in the same custody, and under the same process; for if a prisoner *on mesne* process be superseadeable for any irregularity, (as for not declaring or proceeding to trial or the like,) and does not take advantage of it before he is charged in execution, he cannot afterwards avail himself of it, being then in custody under a different process. *Rose v. Christfield*, 1 D. & E. 591. n. If prisoner superseadeable, when he should take advantage of it.
Explanation of the rule once superseadeable, always so.

But plaintiff cannot charge him in execution after he has obtained the *superseadeas* though before he is discharged by virtue thereof, *Kirk v. Burrowes*, Bar. 375. *Webb v. Dorwell*, Bar. 400.; provided defendant has served the order, otherwise he may, *Clayton v. Stapp*, Bar. 379.

For where a prisoner applies on a mere irregularity, he is in the same situation with any other defendant, and must come in time and do what he ought on his part. *Robertson v. Douglas*, 1 D. & E. 191. Prisoner must complain of any irregularity in first instance.

Thus if a declaration be delivered against a prisoner as such, after he has obtained a *superseadeas*, it is irregular, but unless he apply to the court in due time, subsequent proceedings will not be set aside; the application should

should be made immediately. *Gelegan v. Harper*, 1 H. B. 251. *Hutchins v. Kenrick*, Burr. 1048.

When supersedeable, to whom, and in what actions he is so.

So, a prisoner supersedeable is only so with respect to the plaintiff himself; not to third persons, for by them, so long as he is in actual custody, he may be charged in execution, Burr. 1048, *Hutchins v. Kenrick*.

And only to plaintiff himself in that cause in which he is so supersedeable; for he may be charged in execution in another action, for a different cause at the suit of A. *Grub v. Crick*, Bar. 500.

Of plaintiff's discontinuing or charging defendant with new declaration.

If a prisoner be supersedeable for want of declaration but not superseded, plaintiff cannot discontinue, and charge defendant with a new writ for the old cause. *Peck v. Adams*, Bar. 396.

Nor can he after a *superfedeas*, hold him again to bail in another action for the same cause. *Meredith v. Barry*, Bar. 393.

So, after judgment reversed on writ of error, plaintiff cannot charge defendant with a second declaration. *Peachey v. Bowes*, 368. 499.

Nor after judgment recovered, can he charge him with declaration in an action of debt on such judgment, instead of charging him in execution. *Childs v. Prows*, Bar. 390.

But he may discontinue, and proceed on a common unailable action for the same cause. *Culme v. Dingle*, Bar. 392.

How if he has mistaken his action, or has another cause of action.

So if plaintiff has sued in a wrong capacity, or mistaken his action, if he has only one cause of action, he cannot make a new affidavit and charge defendant with a fresh declaration for the same cause, though in a different form; but if he has a different cause of action against him, he may charge him with it, though originally taken in custody upon the wrong cause. *Abdy v. Hopkins*, *Parsons v. White*, Bar. 391.

The defendant having been discharged by *superfedeas* before judgment, is not finally discharged, but after judgment is subject to be taken in execution. But where a defendant is superseded after judgment, for want of being charged in execution, his person cannot afterwards be taken in execution, Bar. 376. C. B.

When defendant can be taken in execution after *superfedeas*;

A defendant who has been superseded for want of being charged in execution, cannot be held to special bail, in an action brought upon such former judgment; but after judgment obtained in such second action, he may be charged in execution. *Blandford v. Foote*, Cow. 72. *Wright v. Kerfwill*, Bar. 376. *Ismay v. Dewin*, 2 Blac. 982.

or held to bail in an action on the judgment.

A *superfedeas* obtained after judgment, cannot be pleaded in bar to an action on such judgment. *Toppin v. Ryan*, 1 D. & E. 273.

When *superfedeas* pleadable to action on judgment.

Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards set aside on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jaques v. Withy*, Ib. 557.

What shall be satisfaction of judgment.

And if defendant be discharged out of execution on terms not afterwards complied with, plaintiff cannot resort to the judgment again, and charge defendant's person in execution. *Vigers v. Aldrick*, Burr. 2482.

f. Of Proceeding by and against Prisoners having removed themselves, when charged with Process.

f.

B. R.

C. B.

If a prisoner in the Marshalsea on mesne process, removes himself to the Fleet before the plaintiff has declared against him, the plaintiff then must declare in C. B. and cannot proceed further in B. R., unless he brings the defendant back there by

If a prisoner in the Fleet removes himself to the Marshalsea before the plaintiff has declared, the plaintiff must declare in B. R. and cannot proceed further in C. B. unless he brings the defendant back by habeas corpus ad respondendum.

And

by habeas corpus ad respondendum, but he has his election, and may do either. *Sherfon v. Hughes*, 5 D. & E. 35.

But if a prisoner in the custody of the marshal, after being charged with a declaration in B. R., removes himself to the Fleet, the plaintiff must proceed to judgment in B. R., and then bring the defendant back by habeas corpus ad satisfaciendum, to be charged in execution in B. R.

And note, that if upon the defendant's removal from B. R. to C. B., before plaintiff has declared, the plaintiff does not declare within the two terms, (*vide the rule Hil. 26 Geo. 3. ante.*) the defendant's application for a superseas must be made to C. B.

But if he removes after being charged with a declaration, (and not brought back by habeas corpus,) then plaintiff must proceed to judgment in C. B., and may carry him back by habeas corpus to charge him in execution, and for want of being charged in execution in due time, &c. he must apply for a superseas to B. R.

And if a prisoner in the Fleet charged with a declaration in C. B. removes himself afterwards to the Marshalsea, the plaintiff must proceed to judgment in C. B., and then carry him back by habeas corpus ad satisfaciendum, to charge him in the Fleet.

And note, that if upon defendant's removal from C. B. to B. R., before the plaintiff has declared, the plaintiff does not declare within the two terms, the defendant's application for a superseas must be to B. R.

But if he removes after being charged with a declaration, (and not brought back by habeas corpus), plaintiff must proceed to judgment in C. B. and may then carry him back by habeas corpus, to charge him in execution, and for want of being charged in execution in due time, &c. he must apply for a superseas in C. B. Bar. 384, 385.

How if a writ of habeas corpus issues from each court.

If two writs of *habeas corpus* issue, the one out of B. R. and the other out of C. B., where the person is in gaol, the writ which is first served shall have the body, and the prisoner may afterwards by another writ remove himself into the other court; but then he must plead first.

After removal he must be charged in that court where removed.

A prisoner surrendered by bail was superseas, because charged in the same court after he had removed himself, 2 Str. 1153.

Motion

Motion for a *superfedeas* for want of a declaration in C. B. within two terms. Defendant committed to the Fleet (charged *inter alia* with a bill of Middlesex at the plaintiff's suit) before declaration delivered; and afterwards the plaintiff delivered a declaration in the King's Bench at the Fleet, and not a declaration in C. B. which declaration, being delivered, after the defendant had removed to the Fleet, as a declaration of the King's Bench, the court held as null and void, and made the rule absolute. Bar. 402.

If removed to Fleet, though process in K. B. declaration must be in C. B.

Plaintiff having made affidavit of his debt in B. R. arrested defendant by *latitat* indorsed for bail. Defendant removed himself to the Fleet by *habeas corpus*, charged with this *latitat*; and plaintiff declared against him there without making a second affidavit, on which defendant moved to be discharged on a common appearance, insisting, that in order to hold him to bail regularly, plaintiff ought to have made an affidavit of his debt in this court, and procured it to be indorsed on the declaration, according to the rule 8. Geo. 2. A rule was made to shew cause, which was discharged, the court being of opinion, that the rule of court extends only to cases where a declaration is the first proceeding, and not to this case. *Sampson v. Warren*, Bar. 75.

When this may be without fresh affidavit of debt in that court.

The King by his prerogative has a right to sue in what court he pleases, and to imprison his debtor in the gaol for the county or liberty where he is arrested; and another person cannot charge him and remove him by *habeas* to another prison. *Sandys v. Spivey*, Bar. 388.

The King may sue or imprison his debtor where he pleases.

In cases of superceding actions by reason of plaintiff's not proceeding against prisoner in time, the being turned over from one custody to another makes no difference, but is always considered as the continuation of the same custody. Burr. 439.

Proceedings must be in same time notwithstanding removal.

For further information hereon, see Ch. 18. sec. 3. title *Habeas Corpus*.

SECTION IV.

Of Proceedings against Bail upon their Recognizance.

Explanation of
the proceedings
against bail.

In the former volume of this work (Ch. 4), the doctrine of bail has been treated of and explained, and it may be remembered, that when the defendant in compliance with the condition of the bail bond given to the sheriff, appears to the action, bail above or special bail, as it is called, are put in, who enter into a recognizance to the plaintiff. Whereby they undertake, that if the defendant be condemned in the action, he shall satisfy plaintiff the costs and condemnation, or shall render himself a prisoner, or that they will do it for him. (See Vol. I. p. 149.)

But this is only upon the supposition that the plaintiff should not be able to take the defendant in execution, and to get satisfaction from him either by his paying the debt, or by having his body in custody; for if the plaintiff after he has recovered judgment, does not proceed against the person of the defendant, but on the contrary take out execution against his goods or lands, by *fi. facias* or *eligit*, he has made his election, and the bail are discharged.

Necessity of
suing out *ca. fa.*

Whenever therefore plaintiff intends to resort to the bail, his execution must be by *capias ad satisfaciendum* against the principal; which shews he would have the body till satisfaction is made; and this writ of *ca. fa.* must be returned by the sheriff, with a *non est inventus*, for the bail are of course liable only on failure of their principal. This writ amounts to a demand on defendant to pay or surrender himself a prisoner, which if not done by the return thereof, or if the bail do not surrender him within that time in discharge of themselves, it is presumed that they are ready to pay the debt or damages recovered.

If the bail refuse so to do, their recognizance is then forfeited, they are said to be fixed, and plaintiff may proceed

ceed against them either by *action of debt* upon the recognizance, or by writ of *scire facias*, "Whereby the sheriff is commanded to make known to them the judgment recovered, and the force and effect of their recognizance entered into, that the defendant has not surrendered himself to the prison of the marshal of the Marshalsea or Fleet (as the case is), and therefore they appear in court, and shew cause why the plaintiff should not have execution against them, for his debt and damages recovered."

Of the previous Steps of entering Recognizance, and suing out Ca. sa.

As the proceedings against the bail are founded upon the recognizance forfeited, it should regularly be a previous step, whether plaintiff proceed by *scire facias* or by action of debt, to get the recognizance of bail first entered on the roll which must be carried in and docketted.

Recognizance to be entered, and ca. sa. sued out, whether proceedings by action or sci. fa.

I say it should regularly be, because the forfeiture of the recognizance is the ground of proceeding; but yet, in point of practice, it is often not done until after the writ against the bail is sued out; and indeed, should the defendant plead *nul tiel* record of the recognizance, it is sufficient if the roll be carried in any time before the replication; but it is most safe and proper to get it done in the first instance.

In C. B. The filazer upon being requested will enter the recognizance and get it docketted.

How recognizance entered.

In Br R. the attorney does it.

Get roll of the term of which declaration is of, at Mr. Way's office: make a docket paper thus;—"The entry of Thomas Smith, gentleman, one, &c. of Michaelmas Term 35th of George the Third."

Middlesex ff. Recognizance of bail for C. D. at the suit of A. B. Roll. 273.

* If you have before carried in rolls of that term, say, the further entry of, &c.

VOL. II.

I

Enter

Enter on roll memorandum of term declaration is off; then copy declaration, and afterwards recognizance of bail. Carry roll to clerk of judgments, he will enter recognizance, and mark roll; pay 3s. for the docket, then carry it to the treasury chamber and file it.

Form of entry
of recognizance

The form of the memorandum is the same as in making up the issue (vol. I. 384.), and after the declaration is gone through, then go on thus; " And the said
" C. D. by John Palmer his attorney, comes and de-
" fends the wrong and injury, when, &c. and there-
" upon E. F. of Charing Crofs in the county of
" Middlesex, mercer; and G. H. of Fleet-street in the
" city of London, grocer, (describing the bail as in the
" recognizance,) came into the court of our Lord the
" King, before the King himself, at Westminster, in their
" proper persons, and became pledges and manucaptors,
" and each of them became pledge and manucaptor for
" the said defendant, that if it should happen that the
" said defendant should be condemned in the plea
" aforesaid, then the said manucaptors granted, and
" each of them did grant, that all such damages, costs
" and charges (if the action be in debt, and judgment
" be recovered on a verdict, say, did grant, that as well
" the said debt, as all such damages, costs, and charges
" or if in debt, and judgment was by default, say,
" did grant, that as well the said debt, as all damages
" as should be adjudged to the said plaintiff in their
" behalf, should be made of their, and each of their
" lands and chattels, and to be levied to the use of the
" said plaintiff, if it should happen that the defendant
" should not pay the said plaintiff, or render himself
" on that occasion, to the prison of the marshal of
" the Marshalsea of our said Lord the King, before the
" King himself."

How *ca. sa.* sued
out.

Besides making an entry of the recognizance, a writ
of *capias ad satisfaciendum* against the principal must be
also sued out, and returned *non est inventus*.

Its teste and re-
turn.

If proceedings be by bill, eight days between teste and
return of *ca. sa.* is sufficient; if by original, 15.

Care should be taken that the *ca. sa.* does not bear teste of a term prior to that in which judgment is signed against the principal; as all proceedings against the bail thereon will be irregular. *Gawler v. Jolly*, 1 H. B. 74.

The *ca. sa.* is left in the sheriff's office, and must be left there four days before the return; sheriff then returns it *non est inventus*. How left in the sheriff's office.

There is no attempt in point of fact to find the principal on this *ca. sa.* but it is merely as a warning that plaintiff means to proceed against the bail; or rather the *ca. sa.* against the principal being left in the sheriff's office, is as notice to the bail, that the plaintiff will proceed against the person, and it is incumbent on the bail to search whether any *ca. sa.* be left in the office. *Burr.* Rept. 4 pt. 1360. Intent thereof.

Bail must search for it.

The *ca. sa.* need not be filed immediately on the return, but if defendant pleads no *ca. sa.* sued out, if it be filed any time before replication, it is sufficient. When to be filed.

If the plaintiff has not sued out a *ca. sa.* against the principal, in order to ground his proceeding by *scire facias* against the bail, within a year after the judgment obtained, a *scire facias* should first go against the principal to revive the judgment, before a *scire facias* goes against the bail on their recognizance; but the bail cannot take advantage of this. *Raym.* 1096. 6 Mod. 304. *Holt*, 90. If *ca. sa.* not sued out within the year, *sci. fa.* to revive judgment must first go.

How to proceed by Action on Recognizance.

Sue out process as in a common action, as *latitat* or *capias*; but defendant cannot be arrested; the only difference is, that although the process be not bailable, yet an *ac etiam* must be inserted that the defendant may have notice for what he is sued, and that the writ ought to be served at least four days before the return, that defendants may have the usual time to render the principal; the *ac etiam* is as follows:

B. R.

And also to a bill of the said A. B. against the said C. D. and E. F. in a plea of debt upon recognizance, according to the custom of our court before us to be exhibited.

Lay the venue always in Middlesex.

C. B.

And also that the said C. D. and E. F. answer the said A. B. in a plea of debt upon recognizance, according to the custom of our court of Common Bench.

Lay the venue in Middlesex, or in the county where recognizance was taken.

See *post*, Observations A.

All the subsequent proceedings are as in other cases.

How to proceed by Scire facias.

The recognizance being entered and *ca. fa.* returned as above, prepare *scire facias*, (which is generally made out by the attorney,) engross it on 2s. 6d. stamp parchment, get it signed and sealed; it is then at your option either to cause the defendants to be actually summoned thereon or not.

If Defendant is to be summoned.

Carry *sci. fa.* to the sheriff's office, get a summons thereon, give it to your officer, who will summon each of the bail; let *sci. fa.* lay in sheriff's office the last four days exclusive before the return day; when it is returnable, call for the return, sheriff will return *scire feci*. Then in

B. R.

Give a rule for judgment on piece of plain paper.

A. v. B. and C. bail of D.
rule on *sci. fa.*

It is a four day rule exclusive, enter it with clerk of rules, make an entry of *sci. fa.* or

part

C. B.

Give rule at protobonary on the appearance day of return of *sci. fa.* for defendants to appear; enter *sci. fa.* on roll to be had at protobonary's, and expiration of rule to appear, if no appearance entered, the clerk will sign judgment; file with *custos brevium*, and

part thereof, shewing the sum recovered on a roll, get it marked by clerk of judgments, and then sue out execution against the bail, which may be by ca. fa. or fi. fa. and either against both or only one of the bail, let sci. fa. be tested on return of ca. fa. if by bill; if original, as in C. B.

out execution, which may be as in B. R.
Let sci. fa. be tested on the quarto die post of return of ca. fa.

Where only one *sci. fa.* it is sufficient if there be 4 days exclusive between teste and return.

If Defendant is not to be summoned.

Prepare *sci. fa.* carry it to sheriff's office, get it returned *nihil*, sue out an *alias* tested on the return day of first *sci. fa.* in B. R., and on *quarto die post* of such return day in C. B., let it lie in sheriff's office the last four days exclusive before the return, when returnable get it from sheriff returned *nihil*; let there be 13 days between the teste of the first *sci. fa.* and the return of the *alias*, and it will do whether proceedings be by bill or original. Having got second *sci. fa.* returned *nihil*, proceed to give rule for judgment in B. R., and for appearance in C. B., as abovementioned,

Let the returns of the writs be on a particular or general return, as the proceedings are by bill or original.

Where a *scire facias* against bail is not returned, the plaintiff cannot proceed upon an *alias sci. fa.*, without an entry of the first upon the roll. *Ld. Raym. 822, 1252.*

If the second *sci. fa.* be returnable of different terms in B. R., enter the first on a roll of the term in which it is returnable, and make an award of the second, get it docketed and marked by the clerk of the judgments in the next term; on return of second *sci. fa.* clerk of treasury will, after expiration of rule for judgment, enter the award of the judgment on the same roll.

How if *sci. fa.* be returnable in different terms in K. B.

In C. B.

But in C. B. there must be two different rolls, the one of the term on which first *sci. fa.* is returnable, and whereon the first must be entered with an award of the second, and docketed as of that term; and on the other the second *sci. fa.* is to be entered with the judgment, on default of appearance.

Such are the proceedings, if the bail do not appear: if they do, the appearance is effected, and the subsequent proceedings are as follows:

Of the Appearance of Defendant, and the subsequent Proceedings.

If defendant appear on the *sci. fa.*, such appearance is effected in

B. R.

By defendant's attorney giving plaintiff's attorney notice on a slip of paper, that he appears for defendant upon the sci. fa.

C. B.

By entering appearance on a slip of paper at prothonotary's.

Plaintiff then declares (declaration to be ingrossed on treble 1*d.* paper, charge 8*d.* per folio), to which defendant pleads, &c. and the subsequent proceedings are carried on the usual way. A rule to plead, and demand of plea necessary as in other cases, and defendant entitled to an imparlance, if declaration not delivered four days exclusive before the end of the term.

N. B. Plaintiff's attorney, not the clerk of the papers, makes up issue on paper book on proceedings by *sci. fa.* in K. B.

OBSERVATIONS.

A. Of the County in which Proceedings by Action or *Sci. fa.* must be.

B. Of the Teste and Return of *Sci. fa.*

C. Of Leaving the *Sci. fa.* in Sheriff's Office, and the Summons thereon.

D. Of the Bail being fixed, and how relieved by rendering the Principal.

E. Of Relieving them after Error brought on Judgment against the Principal.

F. Of the Declaration and Pleadings on *Sci. fa.*

G. Of the Judgment and Execution.

H. Of Error in the Proceedings, and of amending *Sci. fa.*

A. Of the County in which Proceedings against Bail must be.

3.

In the Court of King's Bench, the course is always to enter recognizances as taken in court, though actually by a judge at his chambers, and in that court they are not taken in a sum certain, as in the Common Pleas, neither are they records till entered.

Of the venue in K. B.

But in the Common Pleas they are records immediately upon the first caption, and bind the lands before filed at Westminster, and when filed, they are records in court; for this reason a *scire facias*, or debt, lies upon them in C. B. either in Middlesex where filed, or in the county where taken; whereas in the King's Bench, a *scire facias*, or action of debt thereon, must be brought in Middlesex.

In C. B.

N. on rule 5 & 6 G. 2. Rules and Orders K. B. 251. 1 Cro. 312. Hob. 195. 2 Sal. 630. *Pickering v. Thomson*, Bar. 267.

Davy moved, to set aside proceedings on a *scire facias* against bail, for irregularity; the *scire facias* being sued out in London, whereas the caption of the recognizance of bail, was (as he alledged) in Middlesex; for being taken before the Chief Justice generally, it shall be understood to be before him and his brethren at Westminster. And cited *Hall and Wickesfield*, Hob. 195. debt on recognizance, taken before the Chief Justice in Serjeant's Inn, Fleet-street, and *venue* laid in London. The question was, whether the recognizance must be considered as entered into where it is taken, or at Westminster where it is enrolled. The court held the declaration was right, because the enrollment expressed it to be taken in London. But if the entry of the record be general, that it was taken before the Chief Justice (without expressing where), it shall be understood to be taken in court; and the *venue* shall be in Middlesex.

Leigh shewed for cause, that where the bail is enrolled as taken in Middlesex, there the *sci. fa.* must be brought in Middlesex only; but where, as taken in any other county, the *sci. fa.* may be in either county; either that in which it is taken, or, in which it is enrolled, Cooke, 31. 2 Barn. 74, 167, with which agrees the case in Hobart. And this was allowed by the court, and by Davy for the defendant, to be the true rule. And on inspecting the record it appeared, that on the 28th of May 1770, the bail was enrolled, as taken the 11th of May preceding, before Sir J. E. Wilmot, at Serjeant's Inn, in Chancery-lane, London. *Kenny against Thornton*, 2 Blac. 768.

See also *Cock v. Greene*, Cooke, 31,

But if bail be taken by a commissioner in the country, 2, whether the *scire facias* may not either be sued out into Middlesex, where the recognizance is entered of record, or in the county where taken, Lutw. 1287. Att. Prac. 361.

Difference between *sci. fa.* to revive, and *sci. fa.* against bail.

A *sci. fa.* to revive a judgment is the continuance of the suit, and must be brought in that county where the original action is laid. A *sci. fa.* against bail is the first proceeding.

B. Of the Teste and Return of *Ca. fa.* and
Sci. fa.

B.

If the action be by bill, there must be eight days between the teste and return of the *ca. fa.*, issued against the principal; *Ball v. the bail of Ruffel*, 2 Raym. 1177.; if by original, 15 days; and in both cases, the writ must lie in the Sheriff's office four days exclusive before the return. 2 Salk. 599.

Of teste and return of *ca. fa.*

The *scire facias* ought not to bear teste before, but it may be tested upon the return day of the *ca. fa.* *Stewart v. Smith*, 2 Str. 866.

Of *sci. fa.*

The *alias scire facias* ought not to be sued out before the first be returned, and should be tested upon the return day of the first. *Andrews v. Harper*, 8 Mod. Rep. 227. Anonymous, *Ib.* 7. 40.

Of *alias sci. fa.*

If two *scire facias* issue, whereupon the sheriff return *nihil*, there must be fifteen days inclusive, between the teste of the first and return of the last; per Holt, Ch. Jus. 7 Mod. Rep. 40. 2 Jones, 228. 2 Salk, 599. 12 Mod. Rep. 215.; but regard need not be had to the number of days between the teste and return of each, 2 Str. 1139.

Where there are two *sci. fa.*'s.

And this whether the suit be by bill or original.

The like practice in Common Pleas. *Peale v. Watson*, 2 Blac. 922.

If only one *scire facias* issue, whereupon the sheriff return *scire feci*, it is sufficient if there be four days exclusive, between the teste and return. *Bell v. Jackson* and another, bail of Stirling, 4 T. Rep. B. R. 663.

If only one *sci. fa.*

A *scire facias* must not bear teste on a Sunday, for it is not *dies juridicus*. Dy. 168.

The *scire facias* must be returnable, as the original proceedings are, that is, at a day certain or a common return. *Ld. Raym.* 1417.

In

In C. B. the filazer makes out the first *sci. fa.* and the prothonotary the second. Barnes, 96.

So in K. B. when proceedings by original.

C. C. Of leaving the *Scire facias* in Sheriff's Office, and of the Summons thereon,

If only one *sci. fa.*

If two.

If only one *sci. fa.* issue, it must lie in the sheriff's office the last four days of the return; and if two, the first must lie there some time before the return, but the number of days is not material; and the *alias* the last four days of the return; and it is not sufficient that it have lain there four days, unless it be the last four days. *Forty v. Hermer*, 4 T. Rep. B. R. 583. *Miller v. Yuraway*, Burr. 1723.

How sheriff to indorse the *alias*,

Every sheriff must indorse on the *alias* the day of the month when delivered or left at the office, R. 5 G. 2.

How bail to be summoned.

When the bail is to be summoned, some notice must be given to them, the sufficiency of which, if disputed, must be determined by the court on the circumstances. In Middlesex it is usual to serve the bail with a copy of the sheriff's warrant, but not so in many counties where often a verbal notice is given. A personal summons and reading the sheriff's warrant to one of the bail, and leaving a memorandum containing the substance of the writ, with the wife of the other bail at his house, held good summons. *Wright v. Page*, 2 Blac. 837.

When.

The bail should be summoned so as to enable them to render the principal in due time.

Summoning them therefore one hour before the rising of the court on the return day, not good. *Wells v. Harvey* and another, 2 D. & E. 757.

A *fortiori*, if summoned after the rising of the court on the return day. *Post v. Willis*, Ib. 758.

Court will take notice of the time.

Nor does the sheriff's return of *scire feci* estop the bail from shewing that they were summoned so late that they

they could not bring in the principal before the rising of the court. *Id.* Notwithstanding the case of *Barr v. Satchwell*, Str. 813.; where the court said they would not enter into the truth of the return.

D. Of the Bail being fixed, and how relieved by rendering Principal.

D.

It has been before observed, that by the condition of the recognizance, the bail undertake that if the defendant does not pay the debt and costs, or render himself a prisoner, they, the bail, will do it for him.

Condition of recognizance.

If therefore, after judgment obtained, the debt and costs are not paid, and a *ca. sa.* issues against the defendant, and he neither renders himself, nor the bail tender him before the return, but the sheriff returns *non est inventus*, the condition of the recognizance is broken, and the bail become fixed.

Consequence of its being broken.

Strictly speaking, the bail are fixed or responsible immediately upon the return of the *ca. sa.*; and although they are allowed to render their principal in discharge of themselves after that time, yet that is a mere indulgence *ex gratia curiæ*, and not *ex merito justitiæ*; so that if the principal should happen to die after the return of the *ca. sa.* and before such tender be made, the bail are liable, and the court cannot relieve them. 2 Wil. 67. Cro. Car. 165. 1 Mod. 31. Ld. Ray. 1452. Str. 717. Bar. 106.

Bail fixed on return of *ca. sa.*

Nor does it signify whether the *ca. sa.* be filed or not; if it be returned it is sufficient to fix the bail, and in case of the death of the principal afterwards, the court will not stay the filing in aid of the bail. *Rawlinson* and another v. *Gunston*, 6 D. & E. 285.

Though not filed.

See also *Hunt v. Cox*, 1 Blac. 393.

Motion to stay proceedings against the bail, the *ca. sa.* was returnable the last return of Michaelmas, viz. 28th Nov. and the principal died 1st Dec. the *ca. sa.* being then in the sheriff's office, and not actually returned.

And even if returnable and in office, though not returned.

turned till the 3d Dec. and the motion was denied. *Boylard v. Crooke* and others, bail of Porter, B. R. 1748.

Within what time court will relieve bail after they are fixed.

But although in strictness of law the bail are fixed at the return of the *ca. fa.* so that no render after that time can be *pleaded*, yet out of indulgence to bail, the courts will on motion stay proceedings against them, provided they render their principal within the time herein-after mentioned, now allowed for that purpose.

If proceedings by action against them.

That is to say, if the plaintiff proceeds by action of debt upon the recognizance, the bail shall in K. B. (by rule Trinity Term 1 Ann) have eight entire days in full term next after the return of the writ to surrender their principal, and upon notice thereof given to the plaintiff or his attorney in such suit, all further proceedings against the bail shall cease.

In C. B. they must surrender the principal before, or on the appearance day of the return of the writ, *sedente curia*. *Derisley v. Deland*, Bor. 82.

And this, whether proceedings by original or attachment of privilege. *Fletcher v. Aingwell*, Imp. C. B. 554.

If writ returnable the 8th, a render on the 11th, *sedente curia*, is good.

And the writ must be served four days before the return.

If by *sci. fa.*

But if the plaintiff sues by *sci. fa.* the bail then have in B. R. until the rising of the court upon the return day of the second *scire facias*, to surrender the defendant, and discharge themselves. Anonymous, 8 Mod. Rep. 341. 1 Wil. 270.

But in C. B. (or in K. B. if proceedings be by original) the bail have till the *quarto die post* or appearance of the return of the first *sci. fa.*, if returned *scire feci*; if not, till the *quarto die post* of the return day of the second *sci. fa.* 1 Wil. 270. 4 Bur. 2134. *Derisley v. Deland*, Bar. 82.

But in all the above cases it must be *sedente curia*, for a render after the rising of the court at a judge's chambers is too late. *Simmonds v. Middleton*, 1 Wil. 270.

And

And when bail apply to the court for relief, having rendered the principal, the affidavit must state the render to have been *sedente curia*. Bar. 75, *Hansley v. Page*. And in *Ling v. Woodger*, Bar. 69, Court ordered the hour and the true time of surrender to be entered by filazer, that it might appear whether it was made before the rising of the court.

What the affidavit must state.

Court will order true time of render to be entered.

The above seems now to be the settled time allowed for rendering, though the practice hath from time to time varied in this respect. Cro. Car. 618. 738. Moor, 850. 3 Bulst. 182.

An action was commenced against the bail, and afterwards the plaintiff was obliged to desist therein, and then the bail surrendered the principal before the new action brought, and moved to stay the proceedings; the court held the surrender to be good, it being before the return of the process in this suit, and it was the fault of the plaintiff not to begin right at first. *Hoare v. Mingay*, one, &c. Stra. 915.

Of surrendering principal after action against bail discontinued and before new one brought.

The manner in which the surrender must be made, has been already shewn. Vol. I. p. 174. ch. 4. sec. 6.

How surrender to be made.

After a defendant is surrendered, notice thereof ought immediately to be given to the plaintiff's attorney, and the necessary steps for exonerating the bail piece taken; for although an omission thereof shall not vitiate the surrender, yet, if any costs have been incurred by reason of such omission, the court will require the bail to pay the same before they discharge them, *Wells v. Osmond*, 6 Mod. Rep. 238.; or if defendant escape or be rescued, bail will be liable.

Of the notice of surrender and of entering exoneretur.

See also *Lyel v. Galletly*, 1 Salk. 101.

A motion was made to stay proceedings against one of the bail, who had been excepted to, and had not justified, but had omitted to get his name struck out of the bail piece. The court denied the motion in its present form, as in the case of *Fulk and Birk*, 4 Geo. 3. saying, that whilst the name remained upon record, proceedings could not regularly be stayed; but as in that case, they now gave leave to enter an *exoneretur* on

When court will suffer it to be entered nunc pro tunc.

on the bail piece, *nunc pro tunc*, on payment of costs. *Humphrey v. Leite*, Bur. 2107.

Of the power of bail over their principal to render him.

The power that the bail have over their principal by way of taking him to make the surrender, has been already treated of. Vol. I. ch. 4. sec. 6. **B.**

May break open his house in search.

And in a late case it has been determined that bail above may justify the breaking and entering the house of A. (the outer door being open) in which the principal resides, in order to seek for him, for the purpose of rendering him, and that such a justification is good, without averring that the principal was in the house at the time. And in such a plea an averment that the defendants "duly became bail, and entered into a recognizance," is sufficient, without stating that the principal was delivered to their custody. *Sheers v. Brooks and others*, 2 C. B. T. R. 120.

How if it be impossible to render principal: as if he be a convict.

And if the defendant be in such a situation that it is impossible for the bail to render him, as a convict on board the hulks sentenced to transportation, court on motion will permit the bail to enter *exoneretur* on the bail piece. *Wood v. Mitchell*, 6 D. & E. 247.

The bail in such case used to apply for a *habeas corpus* to bring him up to render him, but the above is the better way. 4 Burr. 2024. Vergus bail, Str. 1217.

See also other cases on the same principle. Vol. I. ch. 4. sec. 6. **D.**

How if he be a soldier;

So, a soldier may be surrendered by committing him to the marshal, and instantly setting him at large, or an impressed man under the keeper of the Savoy. *Bond and Isaac*, Burr. 339.

or impressed;

or a prisoner;

In general where defendant is a prisoner bail may have *habeas corpus* in term or vacation to bring him before a judge to render him. *Bettesworth v. Bell*, Bur. 1876.

or action be against husband and wife.

If the action be against husband and wife, and both be rendered, if not charged in execution wife shall be discharged. Anon. 3 Wil. 124. Str. 1167. 1237.

If the principal becomes a bankrupt and obtains his certificate before bail are fixed, they shall be discharged on motion. But if they are fixed before the certificate obtained, they remain liable. *Woolley v. Cobb* and others, Burr. 244.

How bail discharged if principal be a bankrupt.

But not so with bail in error; for they, not having the alternative of paying the debt or surrendering the principal, are not entitled to be discharged, although the defendant became bankrupt and be himself discharged of the debt. *Southgate v. Branthwhite*, 1 D. & E. 624.

But not bail in error.

A creditor who obtains a verdict before commission against a bankrupt, is entitled to prove his costs as well as his debt under the commission, though judgment was not signed till after the commission issue. But by proving his debt, and otherwise acting under the commission, he makes his election, and shall not afterwards resort to the bankrupt's bail. *Aylett v. Harford* and *Richards*, bail of *Lowe*. Trin. 19 Geo. 3. C. B. 2 Blac. Rep. 1317.

Plaintiff cannot resort to bail, if he proves debt under the commission.

If upon the return of *non est inventus* to the *ca. sa.* the plaintiff proceed against the bail and deliver a declaration conditionally, the bail cannot apply to the court to stay proceedings on payment of the debt and costs of the original action only, but must also pay the costs of the second action, though the bail tendered the original damages and costs before the end of eight days from the return of the *ca. sa.* within which time by the practice of the court, they might have discharged themselves by surrendering their principal, *Perigal v. Mellish*, 5 T. R. 363.; because a right of action accrued to plaintiff immediately on return of *ca. sa.*

Upon what terms as to payment of debt and costs, bail may be discharged.

C. Of relieving Bail after Error brought on principal Judgment.

The allowance of the writ of error is of itself a *superfedeas*.

The service of the allowance is only material to bring the party into contempt if he sues out execution after-

How writ of error is a *superfedeas*.

afterwards. *Jaques v. Nixon*, 1 D. & E. 279. Burr. 340.

Writ of error should be delivered to clerk of errors to make it a complete *superfedeas*. K. B. R. 36 Car. 2 C. B. Bar. 205, *Meriton v. Stevens*. Ib. 209, *Sykes v. Oates*.

So if bail is required, it must be put in in due time.

Of its operation if allowed before return of ca. fa. against principal.

If therefore writ of error be allowed before ca. fa. sued out, and afterwards plaintiff sues out a ca. fa. and proceeds against the bail, it will be irregular, and such proceedings will be set aside. *Dudley v. Stokes*, 2 Black. 1182.

So if it be after judgment by default. *Ib.*

Ca. fa. cannot afterwards be returned.

And if ca. fa. be sued out but not returned, and in the interim notice of writ of error served, a return of *non est inventus* to the ca. fa. afterwards, pending the error, will be bad to ground any proceedings against the bail, though no such proceedings be had till writ of error spent. *Smith v. Nicolson*, Str. 1186. *Derisley v. Deland*, Bar. 83.

Though it has lain proper time before in the office.

So that where a ca. fa. is returnable against the principal on a particular day, before which a writ of error is allowed and served; that operates as a *superfedeas* to any proceedings against the bail, though the ca. fa. has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*, 3 T. R. 390.

Of the operation of writ of error if allowed after return of ca. fa., but before the time expired when bail might otherwise have rendered.

Whenever the writ of error is allowed after the return of ca. fa., but before the time is expired within which the bail by the indulgence of the court may surrender the principal, though notice of the allowance may not be given to plaintiff's attorney till after the expiration of that time, the court will grant the bail the same terms as are usual when they apply within the time indulged to them for surrendering the principal; which terms are, "That the writs of *sci. fa.* issued against the bail should be stayed until the writ of error shall be determined, the bail undertaking to pay the plaintiff his damages recovered by the judge."

"menty"

ment, or surrender the defendant into the custody of the marshal of the Marshalsea of this court within four days next after the determination of the said writ of error, in case the same shall be determined in favour of the defendant in error." *Capron v. Archer*, Burr. 340.

of the terms in such case on which bail will be relieved.

By determination of writ of error is meant the final determination.

Error was brought in *cam. scacc.* upon a judgment obtained against the defendant in B. R., and writs of *scire facias* had issued against the bail in the original action in B. R., where the bail obtained a rule to stay proceedings against them in B. R. upon the *sci. fa.* until the writ of error returnable in *cam. scacc.* should be determined, they undertaking to pay the debt and damages within four days after affirmance of the judgment, if the same should be affirmed. The judgment was affirmed in *cam. scacc.*, and afterwards the original defendant brought error returnable in parliament, to reverse the judgment given in *cam. scacc.*, on which the bail moved to stay proceedings against them till that writ of error was determined; and though it was objected that the bail were bound by the express terms in the former rule, the court made the rule absolute, holding that the word "affirmance" in the first rule must necessarily be understood to mean final affirmance. *Kirshaw v. Cartwright* and *Pearce*, bail of *Green*, Burr. 2819.

The meaning of final determination of the suit as in the above terms.

But this is only when the writ of error is actually allowed before the time for rendering is expired, and the bail apply within that time; for if there be no writ of error until after the return of the second *sci. fa.*, though it be sued out afterwards, court will make no rule to stay proceedings. *Everitt v. Gery*, Str. 443.

Of the operation of writ of error if not sued out till after time expired for bail to render.

Or even if there be a writ of error in time, yet if the bail do not apply to stay the proceedings pending error, till their time to surrender is out, the court will not afterwards permit them to surrender, but will only stay execution and give them four days to pay the money in, after the judgment is affirmed. *Richardson v. Jolly*, Str. 1270. *Cole v. Buckland*, Ib. 872.

Or if bail do not apply in time.

Of the terms that in such case bail are let in upon.

And if no bail in error, court will make them pay costs.

And in case there be no bail required on the writ of error, court will also make them undertake to pay the costs on the writ of error, if judgment affirmed. *Risford v. Francis*, Str. 877.

When proceedings will be stayed against bail, notwithstanding error.

If bail in error be required and not put in, it is not a *superfedeas*, and court will not stay proceedings against the bail. *Hunter v. Sampson* and another, Str. 781.

In like manner proceedings will be stayed, pending error, if plaintiff proceeds by action of debt on the recognizance, nor will the bail be required to give judgment. *Newman v. Butterworth*, Bar. 66. *Clark v. Baker*, Bar. 68. But see *Gosnell v. Wright*, Bar. 86.

But not if bail by laches suffer judgment against them.

If bail do not apply for relief, but suffer plaintiff to get judgment against them, though pending writ of error, court will not afterwards set it aside. *Fisher v. Emerson*, Str. 526. *Humphreys v. Daniel*, Bar. 202. *Clarkson v. Physick*, Bar. 203.

Though in a subsequent case, where plaintiff recovered judgment, and after error brought, proceeded against defendant in an action on that judgment, and got judgment by default in the second action, though court would not set aside the second judgment, they stayed proceedings thereon till writ of error determined; saying, it would be unreasonable that plaintiff should proceed in executing a judgment, which would of course fall to the ground in case the original judgment upon which it was founded should be reversed. *Taswell v. Stone*, Burr, 2454.

Bail not liable to costs on affirmation of judgment.

The bail in the original action upon a writ of error brought, are not liable to the costs upon the affirmation of the judgment.

How if error brought for delay.

In all cases, whether in K. B. or C. B., where it manifestly appears that the writ of error was brought for delay: plaintiff may proceed to execution against the principal or against the bail upon their recognizance, and such proceedings will not on motion be stayed or set aside. *Entwistle v. Shepherd*, 2 D. & E. 78.

But

But it should be by a confession of defendant or his attorney to that effect. *Pool v. Charnock*, 3 D. & E. 78, 79.

Same Practice in C. B. But see vol. I. ch. 12. I.

ff. Of the Declaration and Pleadings.

f.

A declaration on a *scire facias*, returnable the last return of the term, may be entitled of the same term generally. 3 Will. 154. How declaration entitled.

A man may plead in abatement or in bar to a *scire facias*, as well as other actions. *Lucas*, 112. What may be pleaded to it.

There are but few pleas in bar which can be pleaded by bail to a *scire facias*.

They can plead that no *ca. sa.* issued against the principal, or that he died before the return of the *ca. sa.*, or that the plaintiff had other execution; indeed if there be no *ca. sa.* sued out, returned and filed, it is no ground for a motion to quash the *scire facias* against the bail; but the bail must plead it, and be discharged by that means, and the replication to such plea must shew the time when *ca. sa.* issued, and that it was returned *non est inventus*, and not traverse the fact generally. *Carth*, 4. And to a plea to *sci. sa.* against bail, that the principal died before the return of any *ca. sa.*, a replication, stating a particular *ca. sa.*, and that the principal was alive at the return of that *ca. sa.*, must conclude with an averment; for the *ca. sa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. *Henderson v. Witby*, 2 T. R. 576. Of plea that no *ca. sa.* issued against principal.

They cannot plead, that the principal died before the *scire facias* issued. *Cro. Jac.* 163., &c. because it might have been after *ca. sa.* returned. Of the replication to such plea.

But they can plead, that the principal died before any judgment against him; because they cannot have a writ

or release ;

or nul tiel record ;

of error to reverse that judgment, or they may plead a release, or *nul tiel* record. But not that they rendered, or principal rendered himself after the return of *ca. fa.*, as that is only ground of relief upon motion.

or payment.

Bail pleaded to a *scire facias*, payment by the principal before the return of the second *scire facias*, and it was resolved the plea was bad ; for in strictness of law, the recognizance was forfeited by suing out the first *sci. fa.* against the bail. *Ld. Raym.* 157.

But now by 4 & 5 Ann. c. 16. s. 12. payment of the sum recovered may be pleaded as well to a *sci. fa.* as to an action of debt.

But cannot plead, that one of the principals in a joint action was taken.

Sci. fa. against the defendant, as bail for A. B. C. and D., the defendant pleads that before the return of the second *sci. fa.* the plaintiff took A. in execution, and still detains him ; demurrer *inde*. It was argued for the defendant, that the plaintiff having taken one of the principals in execution, had thereby disabled the bail to render him, and therefore discharged him as to all the rest ; *Sed per cur.* The bail have undertaken to bring in all four principals, and therefore though the plaintiff hath taken one, this does not discharge the bail as to the other three, for they ought, as they took upon them, to bring in all four. 2 Lev. 192. 1 Vent. 315.

If *ca. fa.* against principal be void, bail cannot take advantage of it.

A *ca. fa.* made returnable at a day which falls out of term would not be void, (though liable to be set aside on motion) nor can such a defect in it be taken advantage of by bail, upon a general demurrer to a *scire facias* brought against them. *Burr. Rep.* 1187.

How to proceed if necessary to have writ of enquiry on *sci. fa.*

If the plaintiff in a *scire facias*, either for want of the damages being previously ascertained, or upon obtaining judgment by default upon the *scire facias*, or judgment upon demurrer therein, is of necessity obliged to sue out a *scire fieri* inquiry in order to ascertain his damages, he must give the like notice of executing the same, as must be given in other cases of trial and executing writs of inquiry. For which, *vide* the first volume under these titles.

C. Of Judgment and Execution.

G.

When judgment is obtained against the bail, plaintiff may either bring an action of debt against them upon such judgment, and may hold them to bail thereon. *Bute v. Moore*, Trin. 28 Geo. 3. Imp. C. B. 548. Of the remedy plaintiff has against bail upon judgment against them.

Or he may sue out execution by *ca. sa.* or *fi. fa.* *Elliot v. Smith*, Str. 1139. 3 Sal. 386. Imp. C. B. 548.

The *ca. sa.* should be a *testatum ca. sa.* in all cases. Imp. C. B. 550., in both courts.

In K. B. bail are only liable upon their recognizance to the amount of the debt sworn to, and costs. *Jackson v. Hepel*, Doug. 330. To what extent bail are liable.

But in C. B. the practice seems different, and that bail are liable to the extent of the sum recovered against defendant and the costs, not exceeding their recognizance. *Calverac v. De Miranda*, Bar. 76.

And each of the bail are liable to the amount of their recognizance. *Ib.*

Though the *scire facias* be joint, yet execution may be several, and taken out against one of the bail only. If *sci. fa.* be joint, execution may be several.

But after execution of part against one bail, if the goods of the other be not sufficient to satisfy the residue, plaintiff cannot again resort to the first bail, because he might have levied the whole against him at once. *Fisher v. Carruthers*, Bar. 202. When after part levied against one bail, he may again resort to him.

Although execution issue against the bail, if plaintiff be not satisfied from them, the plaintiff may still take the principal. 2 Cro. 320. 549. 1 Sid. 107. Principal still liable if no satisfaction from bail.

D. Of Error in the Judgment and amending *Sci. fa.*

H.

If bail bring error upon an award of execution in a *scire facias* against them, matter which lies properly in the mouth What assignable for error.

mouth of the principal, or might have been pleaded to the *sci. fa.*, is not assignable for error, after execution awarded against them. *Wraight v. Kitchingham*, Stra. 197. Salk. 262. 4 Mod. 306.

A *ca. fa.* may be void as to the principal, and yet well enough to ground a *scire facias* against the bail; as if *ca. fa.* be sued out a year after judgment, without reviving the judgment by *scire facias*; for the bail are strangers, and cannot take advantage of that error in a collateral action. 2 Ld. Raym. 1096. 6 Mod. 304. Holt, 90.

There should be fresh warrant of attorney.

In proceeding by *sci. fa.* there must be a fresh warrant of attorney to prosecute, the warrant in the original action is not a sufficient authority; a judgment on *sci. fa.* against bail was reversed for want of such fresh warrant. Salk. 603, *Atwood v. Burr*.

Care should be taken in proceedings on *sci. fa.*; for a *scire facias* against bail is not amendable.

Sci. fa. not amendable.

In a *scire facias* against bail, the plaintiff made a mistake in setting out the recognizance, which the defendant took advantage of, by pleading *nul tiel* record. And afterwards the plaintiff moved to amend it, but was denied; for *sci. fa.* against bail are never amended; and the course is for the plaintiff to quash his own writ, and proceed anew. This may be to defeat the bail of an opportunity to surrender, which he would have done, if he could not have been sure of proceeding in his plea. *Grey v. Jefferson*, Stra. 1165. *Bond. v. Turner*, 8 Mod. 305.

But Q.

But in the Common Pleas, a *scire facias* against bail and all proceedings thereupon, were ordered to be amended by the record in the original action, by inserting the word merchant instead of mercer, being the defendant's addition, even after issue joined upon *nul tiel* record. *Smeetland v. Beezley and Brown*, Bar. 4.

But court will quash it.

A *scire facias* ordered to be quashed on plaintiff's motion, without costs, before plea pleaded, although the defendant had entered an appearance. *Barnes*, 431.

SECTION V.

Of Proceedings by and against Infants.

To point out the various cases in which infants are rendered liable to an action, and the distinctions in law which renders their acts either binding or void, or only voidable, would exceed the limits and purposes of this work, which only professes to explain the mode of proceeding in an action brought by or against them.

If an infant as defendant in the action be arrested, or if after he has arrived at full age he be arrested for a cause of action which accrued in his infancy, he cannot be relieved upon motion; for the court will not try the question of nonage upon a mere affidavit, but defendant must resort to his plea of infancy.

Of Proceedings by an Infant.

If an infant is plaintiff the writ may be sued out in his own name, but he must declare by *prochein ami*, or next friend [for the reason and origin of this see *Appendix Q.*] and this in all cases where he sues alone; but if he be co-executor with others of full age, and a joint action be brought by them, they may appoint and sue by attorney, being deemed only as one person in law. *Frescobaldi v. Kinaston*, 'Str. 783.

Infants must declare by guardian.

[Appendix Q.]

It is for this reason that an infant cannot be plaintiff in a *qui tam* action, because the stat. 18 Eliz. c. 5., requires such suit to be exhibited in proper person, and prosecuted only in person or by attorney. Anon. Say. 50.

Cannot be plaintiff in *qui tam* action.

The *prochein ami* or guardian is appointed by the court, either by his appearance with the infant before a judge, or by a petition from the infant for that purpose,

How *prochein ami* or guardian appointed

and a written acknowledgment from the *prochein ami* that he consents to become such guardian, and an affidavit of any indifferent person of the infant's signing such petition, and of guardian's giving such consent.

When.

This appointment should be obtained before declaration, and when the rule is obtained, a copy thereof should be annexed to declaration when delivered.

Guardians place of abode how known.

If defendant's attorney wishes to know the *prochein ami* or guardian's place of abode, he may obtain rule or order for that purpose. 1 Wil. 246.

Defendant need not plead till guardian appointed.

Defendant is not obliged to plead till such guardian be appointed, and the rule of court for that purpose is produced.

Admission may be general.

A general admission of *prochein ami* is sufficient, no need of a particular admission for every action. *Archer v. Frowde*, Str. 304.

Form of petition.

A petition to assign an infant a guardian, &c. is in the following form, directed to the Chief Justice of the court :

In the King's Bench,

Between { A. B. the younger, plaintiff;
and
C. D. defendant.

To the Right Honourable Lloyd Lord Kenyon, Lord Chief Justice of England.

The humble petition of A. B. the younger, an infant under the age of 21 years, the plaintiff in this cause sheweth,

That your petitioner has, as he is advised, a good cause of action against the defendant C. D., for entering into and taking the mesne profits of a messuage or tenement and garden belonging to your petitioner; the possession whereof he has lately recovered against him, on an ejectment at his demise; and that your petitioner

has lately brought this action against the said C. D. in this honourable court for such entry, and taking the said mesne profits, but in regard to your petitioners infancy.

Your petitioner humbly prayeth your lordship would be pleased to assign his father J. B. the elder, as and for your petitioner's guardian, to prosecute his said suit or action against the said defendant C. D., and your petitioner shall, &c.

A. B.

The foregoing petition must be signed by the Chief Justice, for which a fee is paid to his clerk; it is then carried, if in the King's Bench, to the clerk of the papers; if in the Common Pleas, to the prothonotary; who enters it, and draws up the rule of admission, and the judge's clerk files the petition, which is then considered to be of record.

The guardian's consent is as follows :

I do accept and agree to be guardian to the plaintiff
A. B. an infant, according to the prayer of the above pe- Form of guar-
tition. Witness my hand this dian's consent.
day of
1795. J. B.

Form of guardian's consent.

An affidavit of the infant's signing the petition, and the guardian's consent, must then be made, to the following effect :

In the King's Bench,

Between { A. B. the younger, plaintiff;
and
C. D. defendant.

Form of affidavit necessary.

L. M. of in Gent. maketh oath, That
A. B. the younger, an infant, the petitioner in the pe-
tition hereunto annexed named, on this present
day of did duly sign the petition hereunto an-
nexed in this deponent's presence; and this deponent
saith, at the same time he was present and did see J. B.
the elder, the person mentioned in the said petition,
duly

duly sign the acceptance or agreement thereunder written, in order to his being a guardian to the said A. the younger.

Sworn at, &c.

Before, &c.

When declaration delivered, annex a copy of the rule of admission.

The petition and consent are to be written on treble 6d. stamp paper.

Prochein ami liable to costs.

The *prochein ami* is liable to costs if he fails, and may be proceeded against by attachment if he refuses to pay them; but the infant himself is not responsible. Bar. 121 Str. 548. So *prochein ami* is liable to costs for not proceeding to trial. *Englefield v. Round*, Cook. Rep. 32.

If *prochein ami* not of sufficient responsibility, court will order another who is. Str. 708.

How if infant taken in execution for them.

But if the infant should be taken in execution for costs, he can only take advantage of it by writ of error; the court will not discharge him on motion. *Gardiner v. Holt*, Str. 1217.

Infant's declaring by attorney cured after verdict.

By the statute of Jeofails, 21 Jac. 1. c. 13. if an infant when plaintiff, appears and declares by attorney, it is cured after verdict or after judgment by default, by the 4 & 5 Ann.

Of Proceeding by an Infant Defendant.

Infant must defend by guardian.

An infant when defendant, must in all cases appear by guardian, whether he is sued alone or jointly, and even when sued as co-executor with others. And the reason given why an infant when he sues as plaintiff with his co-executors, may sue by attorney, but cannot when defendant in such action appear by attorney, is, that as plaintiffs they cannot sever in declaring, but as defendants they may sever in pleading. *Frescobaldi v. King*, Str. 783.

Whence

Whenever therefore, an action is brought against an infant, he must before he puts in his plea, get a guardian appointed to appear and defend for him. This appointment is either by the guardian personally attending with him before a judge, or by petition and consent of the guardian, and affidavit thereof in the same way as before shewn in case of an infant plaintiff.

Which must be appointed before plea.

If defendant does not appear by guardian in the time allowed by the rules of the court, the plaintiff must procure an affidavit of the service of the copy of the writ, and that defendant is an infant, and hath not appeared; upon which, the judge, without taking out any summons, will make an order, "That unless the infant appears within six days after personal service of the order, plaintiff may assign John Doe for his guardian, and enter appearance for defendant:" and upon an affidavit of the service of this order, and shewing the original, the judge will make the order absolute; and then an admission is drawn up and filed as aforesaid.

How plaintiff can compel such appointment.

If plaintiff has proceeded in his cause till issue, &c. upon defendant's appearance by attorney, not knowing that the defendant was an infant, and then discovers it, he should move for a rule to shew cause why the appearance in the filazer's or judge's books should not be struck out, and defendant be obliged to appear by guardian, and why record should not be made conformable to it.

Plaintiff must take care not to proceed against an infant without his guardian.

If an infant be served with process to appear by attorney, the court will make a rule for him to appear by guardian, or plaintiff to be at liberty to name and to appear and defend for him. Barnes 418, *Gladman v. Batesman*.

And if plaintiff appears for defendant according to statute, not knowing he was an infant, and error brought, it is too late to apply to the court to amend the irregularity.

And must apply in time for guardian to be appointed.

Plaintiff appeared for defendant as a person of full age by affidavit, pursuant to the statute, and proceeded to judgment: and defendant brought a writ, and it was disclosed that he intended to assign nonage for error

for

ror in fact. On which plaintiff moved to strike out the appearance in person, and enter an appearance by guardian for defendant, if he did not appear and do it himself; but the court denied it, thinking the plaintiff's application too late. Barnes 413, *Kerry v. Cade*.

How if he enters appearance according to statute when defendant is an infant, not knowing that fact.

Affault and battery, whereby the plaintiff lost her leg, the defendant being served with a *capias ad respondendum*, did not enter his appearance at the proper day after the return thereof; therefore the plaintiff's attorney made an affidavit of the service, entered an appearance for the defendant according to the statute in person, left the declaration in the office, gave notice to the defendant thereof, and to plead; whereupon the defendant employed Mr. Waldo, an attorney of B. R., to take the declaration out of the office, and plead the general issue, who did so in the name of one Palmer, an attorney of C. B. Thereupon the plaintiff's attorney made an affidavit and delivered the issue, gave notice of trial, set down the cause, subpoenaed witnesses, and gave briefs to his counsel; but when the cause was just coming on to be tried, the plaintiff's attorney discovered that the defendant was an infant of about 17 years old, so that he ought to have appeared and pleaded by guardian; and therefore if the plaintiff had proceeded to trial and judgment upon this record, it would have been error.

Wherefore it was now moved on behalf of the plaintiff, that the defendant or his attorney might shew cause why the appearance in the filazer's book should not be struck out, and the defendant be obliged to appear and plead by his guardian, and why the record should not be amended conformably thereto; and why the plaintiff should not have his costs, occasioned by the defendant's attorney, who must be supposed to know his client was an infant, and so had led the plaintiff's attorney on to proceed thus far erroneously; upon an affidavit of these facts, and that Mr. Waldo was a trustee for the defendant in a settlement, and must know he was not of age when he pleaded.

On shewing cause for the defendant, it appeared by affidavit, that Mr. Waldo acquainted the plaintiff's attorney, that the defendant was an infant; but this was

the plea pleaded, and he not believing it, proceeded above.

Per Curiam : In this case the plaintiff's attorney ought to have applied to the defendant to name a guardian, and if he did not do so in six days, then plaintiff ought to have applied to the court to oblige him so to do; it was the plaintiff's attorney's own fault to proceed unconsciously, although no notice had been given to him that the defendant was not of full age; and if the plaintiff had proceeded to judgment, and error had been brought, and afterwards the plaintiff had moved here to have made the record right, this court would not have done it; and therefore as to costs, there is more reason that the plaintiff should pay costs for being permitted to have the record made right, than that the defendant should pay costs to the plaintiff: however, as costs have been prayed by the defendant, let the defendant be made guardian in six days, and let the record be made agreeably thereto without costs of either side. *Man v. Stevens*, 2 Wil. 50.

Plaintiff's attorney should apply to defendant to name his guardian.

If an infant appears by guardian before he obtains rule of court, it is only a misdemeanor in the attorney, and not error; but if he appear by attorney it is error. *Crom.* 158.

How if infant appears by guardian without rule of court.

An attorney undertook to appear for the defendant infant, and entered it by mistake *per attornatum*. *Per* curiam. It may be amended, and made *per guardianum*, if he is bound to appear in a proper manner. *Stratton v. Burgis*, 1 Str. 114.

How if attorney undertake to appear for defendant an infant.

But this is only where the attorney has expressly undertaken to appear for defendant. *Power v. Jones*, 1 Str. 445.

In replying to a plea of infancy, the plaintiff must shew enough in the replication to maintain every part of the declaration; and if a replication which is entire be bad as to part, it is bad as to the whole. *Ib.* 40.

Replication to plea of infancy.

Assumpsit on an account stated does not lie against an infant. *Truman v. Hurst*, 1 T. R. 40.

Infant not liable on account stated.

Even

Even though the particulars of the account were for necessities. *Bartlett v. Emery*, Hil. 2 G. 2. B. R. cited in *Truman v. Hurst*, Ib. 42.

What evidence necessary if plaintiff replies a subsequent promise.

If the plaintiff reply to a plea of infancy that the defendant after he had obtained twenty-one, confirmed his promise, and the defendant rejoin that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time. *Borwick v. Carruthers*, Ib. 648.

Infant defendant liable to costs.

An infant defendant (though a guardian appointed) is liable to costs, if verdict be against him. Dy. 104. 1 Bul. 189. Str. 1217, *Gardiner v. Holt*.

If he appears by attorney it is error.

The statutes of *Jessails* do not cure the error of an infant, when defendant, appearing by attorney; it only extends to infants when plaintiffs.

SECTION VI.

Of Proceedings against Justices of the Peace, Constables, Revenue Officers, &c.

For the encouragement of magistrates and other officers in the execution of their duty, and in order to protect them from vexatious prosecutions, the legislature hath prescribed certain forms and rules which must be strictly adhered to, in all actions brought against them for any thing done by virtue of their authority, or under colour of their respective offices.

Proceedings against justices.

As to Proceedings against Justices.

Venue.

Actions must be brought in the county where the fact was committed, 21 Jac. 1. c. 12.

Limitations of time.

No action shall be brought against any justice for any thing done in the execution of his office, unless commenced within six calendar months after the act committed, stat. 24 G. 2. c. 44. s. 8.

And before any writ is sued out against, or copy of
process served on any such justice, notice in writing of
such intended writ must be delivered to him, or left at his
usual place of abode, or served at least one calendar month
before the suing out of such writ; in which notice
shall be contained, the cause of action which the party
suing claims to have against such justice of the peace;
the back of which notice shall be indorsed the name
and place of abode of plaintiff's attorney or agent,
who shall be entitled to 20s. for preparation and service
of such notice. f. 1.

Notice requi-
site;

For form of such notice see [*Appendix R.*]

Unless plaintiff at the trial proves that such notice
has been given, he cannot have a verdict, but the justice shall
give a verdict and costs. f. 3.

which must be
proved

The notice must contain fully the cause of action, and
evidence shall be given on the trial of any cause
of action, except such as is contained in the notice.

Its contents.

Within one calendar month after such notice given,
the justice may tender amends to the party complaining,
to his agent or attorney; and if not accepted, he may
plead such tender in bar together with not guilty, and
any other plea with leave of the court; and if on issue
taken, the jury shall find the amends so tendered suffi-
cient, then they shall give a verdict for the defendant;
in which case, or in case the plaintiff shall become non-
suit or discontinue; or in case judgment shall be given
for such defendant on demurrer, such justice shall be en-
titled to the like costs as he would have been entitled
to in case he had pleaded the general issue only: and if
the jury find no amends tendered, or not sufficient, and
go against the defendant on such other plea or pleas,
then they shall give a verdict for the plaintiff, and da-
mages, which he shall recover with costs. f. 2.

Justice may ten-
der amends.

In case such justice shall neglect to tender amends,
or shall have tendered insufficient amends before action
brought, he may pay into court, any time before issue
taken, such sum of money as he shall see fit. f. 4.

Or bring money
into court.

Defendant

May plead general issue.

Defendant may always plead the general issue, and give special matter in evidence. Stat. 7 Jac. 1. c. 5.

Plaintiff's costs.

Where the plaintiff shall obtain a verdict, in case the judge shall in open court certify on the back of the record, that the injury was wilfully and maliciously committed, he shall be entitled to double costs. f. 7.

Defendant's.

If defendant gains a verdict, he shall have double costs, by stat. 7 Jac. 1. c. 5. See vol. I. p. 494.

Proceedings against constables.

As to Proceedings against Constables.

Limitation of time.

The action must be brought within six calendar months after the act committed. 24 G. 2. c. 44. f. 8.

And in the county where fact was committed, 21 Jac. 1. c. 12.

Demand of warrant, &c.

No action shall be brought against any constable or other officer, or against any person acting by his order and in his aid, for any thing done in obedience to any warrant of any justice, until demand made or left at the usual place of his abode by the party intending to bring such action, or by his attorney or agent, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand [for form of notice of such demand, see *Appendix R.*]; and in case after such demand and compliance, by shewing the said warrant to, and permitting a copy to be taken thereof, by the party demanding the same, any action shall be brought against such constable, &c. for any such cause, without making the justices defendants, that on producing and proving such warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction in such justice; and if such action be brought jointly against such justice, and also against such constable, &c. then, on proof of such warrant, the jury shall find for such constable, &c. notwithstanding such defect of jurisdiction, and if the verdict shall be given against the justice, that in such case the plaintiff shall recover costs, to be taxed so as to include

[Appendix R.]

include such costs as such plaintiff is liable to pay to such defendants for whom such verdict shall be found. s. 6.

Defendants may plead general issue, and give special matter in evidence. 7 Jac. 1. c. 5. May plead general issue.

Plaintiff shall also be entitled to double costs if judge certifies the injury to be wilful and malicious. s. 7. Costs of plaintiff and defendant.

If defendant has a verdict, he shall have double costs. Stat. 7 Jac. 1. c. 5. See vol. I. p. 494.

As to Proceedings against Officers of Excise and Custom House Officers.

The former are governed by stat. 23 Geo. 3. c. 70. and are nearly the same regulations as above prescribed in proceedings against justices, with respect to the necessity of a previous notice one calendar month before the action brought, the notice to contain the cause of action, the names and places of abode of the plaintiff, and of his attorney or agent [for form thereof see *Appendix R.*]; nothing out of the notice to be given in evidence, a power of tendering amends, and of bringing money into court and the like, except that in proceedings against these officers the action must be brought within *three* months next after the cause of action shall arise, and not afterwards, and shall be laid and tried in the county and place where the facts were committed, and not in any other county or place, and the defendant may plead the general issue, and give the special matter in evidence, and if the plaintiff shall be nonsuited or discontinue, or if upon a verdict or demurrer judgment shall be given against the plaintiff, the defendant shall recover *treble* costs. s. 34. [Appendix R.]

By 24 Geo. 3. c. 70. the proceedings against custom house officers are regulated, and are precisely the same against excise officers. Custom house officers.

They both extend to persons acting by the order or in aid of such officers.

Churchwardens
and overseers.

By statute 21 Jac. 1. c. 12. the provisions of the 7 Jac. 1. c. 5. are extended to churchwardens and overseers of the poor, which gives the general issue and double costs if verdict be for defendant.

OBSERVATIONS.

To what cases
the acts extend.

The privileges under the above acts only extend to cases where the justices, constables, or officers are acting in execution of their offices.

Only where de-
fendants acted
colore officii.

It does not extend to private quarrels, Str. 446.; nor to cases where the constable, though he might have a warrant, does not act in obedience to it; as if he takes up a wrong person not mentioned in the warrant. *Money v. Leach*, 3 Burr. 1742.

But though the act be not strictly warranted by his official capacity, yet if done *bona fide* in the supposed execution of his duty; as where an excise officer assaulted an innocent person on the suspicion that he was a smuggler, he comes within the act. *Daniel v. Wilson*, 5 D. & E. 1.

Only to torts.

The acts only extend to cases of *torts*, not to actions of another nature brought against officers.

As actions of *assumpsit* for money had and received. *Feltham v. Ferry*, Bull. N. P. 24.

To what per-
sons they ex-
tend.

A secretary of state is not a justice of peace, nor his messengers constables, within the stat. 24 Geo. 2. *Estick v. Carrington*, 2 Wil. 275.

But an overseer of the poor who distrains for a poor rate under a justice's warrant is within the act. *Nutting v. Jackson*, Bull. N. P. 24. Espin. 340.

So is the lord of a manor, who is also a justice in an action against him for taking away a gun, for it will be presumed he acted as a justice. *Briggs v. Sir Frederick Evelyn*, 2 H. Bl. 114.

If the justice pleads tender of amends under the statute, plaintiff may have a rule for defendant to bring the money into court, that he may take it out and discontinue. *Lawrence v. Cox*, Bull. N. P. 24.

How plaintiff may proceed on defendant pleading tender.

If the justice omits to tender amends, and afterwards moves to pay money into court, it must appear that the action is brought against him for something done as a justice in the execution of his office. *Casbourn v. Ball*, 2 Blac. 859.

How if defendant moves to pay money into court.

This will appear by proper affidavit and annexing plaintiff's notice of action, which shews defendant to be sued as a justice.

Notice by the act may be left at the dwelling-house, and indeed, generally speaking where it is required by law that notice shall be given to a party before he shall be affected by any act, leaving it at his dwelling-house is sufficient. *Jones v. Marsh*, 4 D. & E. 465.

What service of notice good.

The time of limitation is strictly adhered to; nor can an action be maintained against officers of the customs for seizing goods as forfeited by the revenue laws, unless it be brought within three months after the actual seizure, notwithstanding a suit is instituted in the Court of Exchequer, for the condemnation of the goods which is depending at the expiration of the three months. *Godin v. Ferris*, 2 H. Blac. 14.

What shall be commencement of action within the act.

Where an act confers certain privileges on officers who may be sued for things done in pursuance of that act, and a subsequent act imposes new obligations on the old officers, the privileges of the former statute do not attach on them in respect of things done under the latter. *Bazing v. Skelton*, 5 D. & E. 16.

Subsequent acts do not confer protection of prior acts, unless so expressed.

Therefore toll-gate keepers sued for acts done under the 25 Geo. 3. c. 51. need not be sued in the county where the fact was committed, as they must be under the 13 G. 3. c. 78. s. 81. *Ib.* 16.

SECTION VII.

Of Proceedings by and against Corporations.

By corporations. If a corporation sue, they must sue in the name of the corporation, by an attorney appointed under the seal of the corporation. They may sue in the common way by *latitat* or *copias*.

Against corporations.

By original and distringas.

But if a corporation is sued, it must be sued by its name of incorporation by original writ; and in order to sue a corporation, the plaintiff's attorney must make out a *præcipe* for an original writ, which original writ must be made out by the curfitor of the proper county, and duly filed with the filacer in B. R. or *custos brevium* in C. P. on which a summons must be made out, containing the whole cause of action for the sheriff to summon them, whose officer may serve it upon the town clerk, upon which, if they appear, the proceedings are the same as in other cases; but their appearance must be by an attorney appointed under the common seal, and not in their own persons. Bro. Corp. 28.

In general the town clerk undertakes for appearance or some attorney appointed by them*.

How issues directed to be returned.

If they do not appear upon the summons at the return of the original writ, get writ returned *summons feci* by sheriff, then take out a *distringas* and proceed against them by distress infinite: and it is not sufficient if the particular persons distrained upon appear at the

* Form of declaration against a corporation is, The Mayor, &c. (let title of corporation be correct) were summoned to answer A. B. in a plea of trespass on the case, &c. And thereupon the said A. B. by his attorney, complains, for that whereas the said Mayor, &c.

Appearance is entered with filacer, form of *præcipe* is

Appearance for the Mayor, &c. of returnable

against A. B. to an original T. S. Attorney.

return

return of the process; Bro. Corp. 28.; or if all the members of the corporation appear in person; but they must appear by an attorney appointed under seal.

Should the sheriff return but small issues on the *distringas* the court on motion will order him to return greater.

In an action against the East India Company for 1000*l.*, it was moved, that the sheriff return exemplary issues, because several writs of *distringas* had been already served to no purpose; and the court said, he should return good issues; and if he did not, the plaintiff might bring an action against him; but at last he was ordered to attend. Salk. 191. pl. 2.

It is now settled that a corporation is not entitled to an essoin. 2 D. & E. 16. No essoin.

If corporation be sued by *capias*, and plaintiff enter an appearance according to statute, proceedings will be set aside, because they should be sued by *pone* and *distringas*; but if defendants themselves appear, the objection is waived. *Langley v. Bailiffs, &c. of East Retford*, Bar. 415. If sued by *capias* how objection waived.

Corporations aggregate must sue and be sued by attorney, and therefore the proper process against them is a *distringas*. Co. Lit. 66. General observations as to corporations.

A corporation cannot be essoined. Dalt. 121. pl. 154.

Nor outlawed. 10 Co. 32. b.

No attachment lies against a corporation.

A corporation cannot be declared against, as in the custody of the marshal. 6 Mod. 183.

A corporation cannot sue as a common informer. 2 Stra. 1241.

As outlawry does not lie against an aggregate corporation, therefore trespass does not lie against them; for a *capias* and *exigent* do not go. Bro. Corp. 43.

Corporations aggregate cannot distrain in their own persons, but by their bailiff; therefore replevin does not lie against them by the name of their corporation. Brownl. 175.

Corporations cannot sue without their head; or, in time of vacation of their headship. Wood's Instit. 110.

And if mayor and commonalty bring an action, and the mayor dies, the writ abates. Salk. 398.

Corporations aggregate cannot commit treason, or be outlawed or excommunicated; 10 Rep. 32. 1 Rep. 127. 1 Inst. 134. 2.; or be executors or administrators. *Ibid.* Though 1 Roll. Abr. 915. *contra.* But *quare*; for they cannot take an oath.

They cannot be joint tenants to take by survivorship, but they may be tenants in common. Wood's Instit. 110.

They cannot be seized to the use of another. *Ibid.*

The members cannot regularly be witnesses for the corporation, especially if they testify for any considerable advantage or profit of the body, 2 Lev. 232. 236. 2 Str. 1069.; for every member hath a right and freehold for his life as to his freedom, and all the members together have an inheritance in the lands, and an interest in the goods.

But they may disfranchise a member for that purpose.

Corporations aggregate cannot be bound without deed, therefore no action lies against them, unless founded on a deed. But an action will lie against a corporation sole upon a promise; the party's remedy for non performance is by bill in equity, to compel a specific performance, as to make a new lease, &c.

As to inspecting
books, &c.

Where a corporation is plaintiff in a civil action, leave to inspect their books is granted to the defendant of course. *The Mayor of Lynn v. Danton*, 1 T. R. 689.

Though

SEC. VIII.] AGAINST HUNDREDORS.

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Though in an action by a corporation against a stranger, the court will give the defendant leave to inspect papers, &c. relating to the question. *Corporation of Barnstable v. Leathey*, 3 T. R. 303.

Where a rule had been granted for a *quo warranto* information against A. as Mayor of B. on the relation of some of the corporators, and another rule in that cause for inspecting all the corporation books, papers, &c. directed to the town clerk; an inspection of such only as related to the election and office of Mayor was held to be sufficient compliance with the latter rule, so as to protect the town clerk from an attachment as for a contempt of the court; it appearing, that he had acted *bona fide*, *R. v. G. Ball*, 3 T. R. 579.

SECTION VIII.

Of Proceedings against Hundredors.

In order to render it one common interest for the inhabitants of a district to preserve peace and prevent depredation, the legislature hath enacted, by various acts of parliament, that for certain offences described therein, the hundred shall be liable to the party injured for the loss or damage thereby sustained by him, within the limits of that hundred.

The oldest statutes upon this head are 3 Edw. 1. and 13 Edw. 1. rendering the hundred liable in case of robberies, commonly called the statutes of hue and cry, followed by subsequent statutes of 27 Eliz. c. 13. 29 Car. 2. c. 7. 8 Geo. 2. c. 16. 22 Geo. 2. c. 24.

But by other statutes, the hundred is made liable in case of other offences: as 7 & 8 W. 3. c. 2., for exportation of wool; 1 Geo. 1. c. 5., for pulling down buildings, upon which were several prosecutions, in consequence of the riots in London, in the year 1780; 9 Geo. 1. c. 22., for killing cattle, cutting down trees, setting fire to barns, buildings, stacks of hay, corn, &c.;

8 Geo. 2. c. 20., for destroying turnpikes or works on navigable rivers; 10 Geo. 2. c. 32., for cutting hop binds; 11 Geo. 2. c. 22., for destroying corn to prevent exportation; 19 Geo. 2. c. 34., for wounding officers of the customs; and 29 Geo. 2. c. 36., for destroying woods, &c.

Sometimes the hundred is only made liable to a certain amount, and different restrictions are imposed in the different statutes; but the proceedings in prosecutions upon them (which is the only thing necessary to be considered in this place) are nearly similar; and by briefly shewing how to proceed against the hundred upon the statutes of hue and cry, the proceedings in other cases, by referring to the particular statutes which govern them, may be easily known.

How proceeding to be.

If an action be commenced against hundredors, the suit in B. R. as well as in C. B. must be by original (that is, if the hundred generally are to be sued; but if the suit be against two of the inhabitants of the hundred in the name of the rest, the suit may be by bill in B. R.); for the inhabitants of an hundred cannot be in custody of the marshal. 3 Keb. 126. 2 Saund. 375. 4 Mod. 296.

When to be commenced.

To proceed against an hundred on the statute of hue and cry, 13 Edw. 1. the plaintiff must take out his original writ, which must be tested forty days after the robbery (which forty days are allowed for the hundred to take the thieves by the statute of Winton, R. 3 Lev. 320.), and within a year after the robbery. R. 1 Brownl. 156.

Prepare *præcipe* and get original from curstors of proper county.

The original writ usually recites the statute. H. B. 141. 2 Saund. 374. 4 Mod. 296. 1 Bro. Ent. 99. But the recital of the statute is not necessary; though it must state the circumstances of the robbery, and the plaintiff's compliance with the statutes, viz. that he made hue and cry, gave notice of the robbery, described the felons, the time and place of the robbery; that within twenty days he caused notice thereof to be given in the London Gazette, described the robbers and robbery therein, that he

entered into bond before the sheriff to the high constable of the hundred, with condition for the security of the costs, in case of being nonsuited, discontinuing, &c. that twenty days before the issuing of the writ, he made oath before a justice, that he did not know the parties who robbed him, and that the inhabitants of the hundred have not taken the robbers, &c.

The process served is a copy of the original writ, which process formerly used to be served on some inhabitant of the hundred. But by the 8 Geo. 2. c. 16. it is enacted, "That no process for appearance in any action to be brought upon the statutes of hue and cry, or either of them, against any hundred, shall be served on any inhabitant thereof, save only upon the high constable, or high constables of the hundred wherein the robbery shall happen; who is required to cause public notice thereof to be given, in one of the principal market towns within such hundred, on the next market day after he or they shall be served with such process: or if there shall happen to be no market town within the hundred, then in some parish church within the same hundred, immediately after divine service on the Sunday next after his or their being served with such process: and he or they is and are hereby empowered and required to enter, or cause to be entered, an appearance in the said action, and also defend the same for, and on behalf of, the inhabitants of the said hundred, as he or they shall be advised."

The defendants must enter appearance with the filacter on the *quarto die post* of return of original.

The declaration must be against the inhabitants of the hundred generally; for if it is against any by name, and all are not named, it will be bad. R. 2 Keb. 126.

The declaration need not recite the original at large, Reg. 1654. Mills, 26.; nor more of the statute than is pertinent to the action, 2 Ventr. 215.; and must conclude *contra formam statuti*; i. e. the statute of Winton: for *contra formam statutorum* is bad. Yelv. 116.

If no appearance entered, sue out *disfringas* against all or any of defendants, and so an *alias* and *pluries*, and sell the issues under 10 Geo. 3. as directed *ante* sec. 1.

If

If the defendants plead, and there is an issue, the *venire facias* shall be awarded to the next hundred. Theſ. Brev. 144. *Quare*; for ſince the 29 Geo. 2. c. 18. ſ. 3. it ſeems the *venire* ſhould be awarded *de corpore comitatus* (except the hundred againſt which the action is brought).

If judgment be given againſt the hundred, the ſheriff, &c. upon receipt of any writ of execution againſt any inhabitant, inſtead of ſerving the ſame, ſhall cauſe the ſame to be ſhewn *gratis* to two juſtices of the county, riding, or diviſion, (whereof one to be of the quorum,) who are to cauſe ſuch taxation and aſſeſſment to be made and to be levied according to the 27th Eliz. viz. by the conſtables, &c. rateably and proportionably, &c. in which taxation and aſſeſſment, there ſhall be provided and included, over and above what the coſts and damages recovered by the plaintiff in ſuch action ſhall amount to, all ſuch juſt and neceſſary expences, which the high conſtable of the hundred hath been at in defending ſuch action; claim being made thereto by ſuch high conſtable, before the ſaid juſtices, upon due notice for that purpoſe given him; and the money ſo to be levied, to be paid over by ſuch conſtable, &c. within ten days after collection, to the ſheriff of the county, to the uſe of the plaintiff in ſuch action, for ſo much as his coſts and damages recovered ſhall amount unto, and to the uſe of the ſaid high conſtable, for ſo much as his expences ſhall amount to; of which he ſhall give an account, and make proof thereof upon oath, to the ſatisfaction of the ſaid juſtices, before any taxation ſhall be made for re-imburſing ſuch high conſtable; and ſhall, in ſuch expences, have no further allowance toward paying an attorney to defend the ſaid action, than what ſuch attorney's bill ſhall be taxed at by the proper officer of that court, where the action ſhall be brought, which the ſaid high conſtable ſhall cauſe to be taxed for that purpoſe. Stat. 8 Geo. 2. c. 16. ſ. 4.

The 7th ſection of the above act provides in what manner the conſtable ſhall be reimbursed his expences, in caſe the plaintiff is nonſuited, &c. and becomes, or his ſureties in the bond become, inſolvent.

And by the 22 Geo. 2. c. 46., in all executions againſt inhabitants of any hundred, on any judgment obtained

tained by virtue of any act of parliament whatsoever, the same mode is to be observed as directed in the above statute of 8 Geo. 2. c. 16. s. 4.

To support an action against the hundred for damages on the 1 Geo. 1. st. 2. c. 5. for the riotous demolition of a house, it is not necessary to prove that twelve rioters were assembled at the time. *Prickitt v. Waldron*, 5 T. R. 14.

What to be proved on stat. 1 Geo. 1. c. 5.

Such an action is maintainable by a trustee in whom the legal estate is vested for existing purposes; and (as it seems) even by a bare trustee of a satisfied term. *Ib.*

Trustee may maintain the action.

An order of justices for the levying of money upon the inhabitants of an hundred under the riot act, directing that the money when levied shall be paid into the hands of a banker, subject to their further order is bad. *R. v. Inhabitants of the Hundred of Halfshire*, *Ib.* 341.

Of the order of justices on the riot act.

The money should be directed to be paid to the party entitled. *Ib.*

A writ of execution sued out by the party who has recovered damages against the hundred, and delivered by the sheriff to the justices, is a good foundation for an order to levy the amount. *Ib.*

How writ of execution should go.

The order for levying the damages ought to be upon the inhabitants of the "towns, parishes, villages, and hamlets," pursuant to the 27th Eliz. and not upon the inhabitants of the districts and parishes within the hundred. 5 T. R. 341.

SECTION IX.

Of Proceedings by Paupers.

The enormous expence attendant upon a law suit, which is a general cause of complaint to all, would to the

the poor and indigent be an absolute hindrance to the recovery of their just right by any legal remedy. From motives of compassion therefore, and for the advancement of justice, the legislature hath ordained, "That every poor person who shall have cause of action, &c. shall have original writs, &c. nothing taking for the same. Counsel, attornies, and all other officers requisite and necessary for the speed of the said suits to be had and made, who shall do their duties without any reward." Stat. 11 H. 7. c. 12.

Who deemed a pauper.

A poor person within this statute must not be worth 5*l.* in the world (wearing apparel and his right to the matter in question only excepted); a sum, it must be confessed, considering the present value of money, not agreeable to the spirit of so remedial a law.

Statute only extends to plaintiffs.

It is observable too and to be lamented, that the statute does not extend its relief to paupers, who are defendants. Bar. 328. So that, however unjustly they may be sued, the extra costs of an action may prove their ruin, notwithstanding a verdict in their favour.

The mode of proceeding is by petition to one of the judges of the court, to be admitted to sue *in formâ pauperis*, to which must be annexed an affidavit of plaintiff's poverty.

The petition is engrossed on treble 6*d.* stamp paper, and is as follows :

In K. B.

J. S. Plaintiff,
P. Q. Defendant.

Form of petition.

To the Right Honourable Lloyd Lord Kenyan, Lord Chief Justice of his Majesty's Court of King's Bench.

The humble petition of J. S.

Sheweth,

I humbly conceive that the said petitioner hath good cause of action against the abovenamed P. Q. and humbly accept to be his counsel.

J. M.

*That the said defendant is justly indebted unto your petitioner in the sum of 20*l.* (or whatever the cause of action may be), and your petitioner hath not as yet commenced any action against him, being unable to carry on the said cause on account of his extreme poverty, as appears by the affidavit hereto annexed. Your petitioner therefore most humbly prays your Lordship, that he may be*

be admitted in formâ pauperis to prosecute his said action, and that A. B. Esq. may be assigned to him as his counsel, and C. D. his attorney, to prosecute his said suit. And your petitioner shall ever pray, &c.

In the margin of which petition, in order to prevent frivolous applications, must be inserted as above, and signed by counsel, or in C. B. by a serjeant, the petition being the same, *mutatis mutandis*.

If the action is commenced, for still the party may apply, say in petition, "That your petitioner hath commenced an action against him for the same; but that your petitioner finds himself unable," &c.

To the petition is annexed the following affidavit, written on treble 6d. stamp paper:

"T. S. of, &c. labourer, maketh oath and saith, that he is not worth 5l. in the world (save and except his wearing apparel, and the matter in question in this cause)." Affidavit.

Carry petition and affidavit to judge's chambers, swear the latter, and clerk will make out proper order; pay him 2s. 6d.

No rule is drawn up.

After this all future proceedings are without stamps, as the writ, pleadings, record, *venire*, *disfringas*, &c. The paper book is made up for nothing, nor any fees paid to the officers, the attorney, or council. Exempts plaintiff from fees.

Indeed, if the party give any fee or reward to his counsel or attorney, or make any contract or agreement with them, he shall be dispaupered and not admitted again in that suit. On pain of being dispaupered.

It seems, that if the plaintiff recover a verdict (which I believe must be above 5l.) the officers claim their fees. This however might sometimes defeat the end of the statute, and a pauper might be out of pocket though he had such a verdict. Except he recovers a verdict.

The

Extent of admission ;

The admission only extends to the particular action in which it is granted ; to every suit (if the pauper has more than one) there must be a fresh petition.

of the declaration ;

To the declaration which is in the usual form, annex a copy of the judge's order of his admission.

of the issue money ;

A pauper plaintiff is not entitled to the issue money, and if he sign judgment, because defendant does not pay it, the court will set it aside. *Codron v. Hayman*, 5 D. & E. 509.

of costs.

He is not liable to pay costs, not even if he be nonsuited ; or if judgment, as in case of a nonsuit ; *Blook v. Lee*, 3 Wil. 24. ; but it is at the discretion of the court to dispauper him. Stat. 23 Hen. 8. 2 Sal. 506.

Or defendant may move to have him dispaupered, but unless something vexatious appears in his conduct, the court will discourage the motion.

Though it is said he is liable to pay costs for not proceeding to trial, and for all defaults for which an executor would pay. *Walker v. Parker*, Cook. Rep. 47.

Of a second action, costs of first not paid.

If he be nonsuited, and afterwards bring a second action for the same cause, court will not compel him to pay the costs of the first ; but if his conduct has been vexatious, as giving six notices of trial, and not proceeding, the court will dispauper him. Str. 878. 983.

But if a plaintiff after being nonsuited (not *in forma pauperis*) brings a fresh action, and then sues *in forma pauperis*, court will stay proceedings till the costs of the first are paid. *Wesson v. Withers*, 2 D. & E. 511.

CHAP. XVI.

Of Proceedings in particular Actions, personal and mixed.

- I. *Ejectment.*
- II. *Penal Actions.*
- III. *Replevin.*
- IV. *Scire facias to revive Judgments.*

I. *Of Proceedings in Ejectment.*

THE action of ejectment (as it is now modelled) is a mere creature of Westminster-hall, an ingenious fiction for the trial of titles to the possession of lands, introduced within time of memory, and moulded gradually with great care and attention into a course of practice, by the rules of the court. All the niceties and embarrassments, with which real actions are entangled, are thereby now avoided, and titles are tried with more ease and dispatch, and less expence.

As it is now the remedy generally adopted for recovering premises wrongfully withheld, let the estate be what it may, whether fee simple, fee tail, for life, or years, it is of great importance for the student and practitioner to be well acquainted with the nature and origin of the present modern practice, the several rules of court and acts of parliament by which it is regulated, and in what cases the old method of ejectment is still to be pursued.

It may be proper therefore to consider —

SEC. 1. *The Nature and Origin of the present Modern Action of Ejectment.*

SEC. 2. *Of the Proceedings therein in ordinary Cases, and when the Action should be brought. And herein,*

A. Of

- A. Of the Declaration and the Service thereof.
- B. Of Judgment against the Casual Ejector for Want of Appearance.
- C. Of the Appearance of the Tenant, or of the Landlord under the Statute 11 Geo. 2. and of the Consent Rule.
- D. Of the Proceedings from Appearance to Trial.
- E. Of the Trial and its Incidents.
- F. Of the Judgment and its Effect.
- G. Of new Trial and Arrest of Judgment.
- H. Of the Execution.
- I. Of the Writ of Error.
- K. Of Proceedings by Original in K. B.

SEC. 3. *Of Proceedings in Ejectment in particular Cases.*

- A. By Landlord against Tenant on Stat. 4 Geo. 2.
- B. Where the Premises are untenanted and the Case is not within the Statute 4 Geo. 2.
- C. Of Proceedings by Mortgagee.
- D. Of Proceedings by Corporations.
- E. Of Proceedings in Inferior Courts.
- F. Of Proceedings by and against Infants.

SEC. 4. *Of the Action for Mesne Profits.*

SEC. 5. *General Observations on the Proceedings.*

- A. Of Amending the Proceedings in Ejectment.
- B. Of Consolidating Actions.

C. Of bringing a new or second Ejectment, and of staying Proceedings till Costs of first are paid.

D. Of Security for Costs in other Cases in Ejectment.

E. Of quieting Plaintiff in his Possession after Judgment and Execution in Ejectment.

SECTION I.

The Nature and Origin of the present Action of Ejectment.

Actions are in general divided into real and personal ; but an ejectment is in its nature both ; it is therefore called a mixed action ; for it is real in respect of the land, and personal in respect of the damages and costs.

Ejectment a mixed action.

By the ancient common law, the only method of recovering the possession of land was by real action, by writ of entry or assize, and this in no case where the estate was less than freehold ; for a mere leasehold interest, or term for years, was, in the early period of our constitution, deemed of such little import, that no remedy was provided, whereby the tenant could regain his possession, in case he were ousted by his landlord, or by a stranger. Against the former he could only proceed upon his breach of covenant or agreement : against the latter he might indeed have his writ of ejectment, but could thereby only recover damages, not the possession.

Remedy at common law by real action ;

by ejectment.

Thus were our laws materially defective. For though the freeholder, if disseized, might resort to his real action, yet that was not only dilatory, intricate, and expensive, but at last the possession was thereby only regained, and no damages for the expulsion given ; and on the other hand the termor, if he were ousted, could only by his action of ejectment recover damages and not the possession.

Laws defective in that respect.

In those times the ejectment was a mere personal action of trespass, and the proceedings were by *pone*, or by *capias*, and distress infinite.

When alteration took place;

In progress of time, (some say so early as the reign of Edward IV. 3 Blac. Com. 201. but certainly about the time of Henry VII. when long leases began to creep into use,) the remedy by ejectment was extended and rendered more efficacious, by the object of the action being entirely changed, and the term itself thereby recovered.

and how in ejectment possession was recovered.

This was effected by the courts of law coming to a resolution to give judgment in ejectment, that the lessee in ejectment should recover possession of the land itself by the process of an *habere facias possessionem*.

What induced this alteration.

One cogent reason perhaps, which induced the courts of law to take this step, was a jealousy of the vast increase of business then flowing into the courts of equity, by the lessees of the long terms applying there to get relief when molested, and to secure their possessions against strangers by a perpetual injunction, or against their lessors by a specific performance.

Ejectment since been under control of court.

But be the cause what it may, the alteration was productive of the most salutary effect.

From this period the practice in ejectment became wholly subject to the control of the court, and a new method of trial, unknown to the common law, was introduced.

Old practice explained by fealing lease.

It now became usual for a man that had a right of entry into any lands to enter thereon and seal leases; and then the person that next came on the freehold, *animus possidendi*, was accounted an ejector of the lessee; by which means any man might be turned out of possession; because the lessee in ejectment would recover his term without any notice to the tenant in possession; so that the courts of law, to remedy this inconvenience and injustice, made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a feigned ejector, without delivering the tenant in possession

possession a declaration, and making him an ejector and proper defendant if he pleased.

This rule of court became absolutely necessary upon the alteration of the object of the action of ejectment, which was now *in rem*; for otherwise, the court would have been instrumental in doing an injury to a third person; because a declaration might otherwise be delivered to a stranger, a feigned defence be made, and a verdict, judgment, and execution thereon obtained, whereby the tenant would have been ousted, without notice of any proceedings against him.

Upon this notice to the tenant in possession, and affidavit thereof made, it was usual for the tenant in possession to move the court, that, as the title of the land belonged to him, he might defend the suit in the casual ejector's name; which the court, upon an affidavit of that matter, used to grant; and that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless; and then the casual ejector was not permitted to release errors in prejudice of the tenant in possession, since the suit was carried on in his name by rule of court; and the process for costs was taken out against the casual ejector, who was obliged to resort to the tenant in possession to recover back the same, and put his bond of indemnification in suit upon his refusal to pay them. Styl. 468. 1 Keb. 705. 740, *Keys v. Bredon*.

Such leases were actually to be sealed and delivered, otherwise the plaintiff could maintain no title to the term; and were also obliged to be sealed on the land itself, otherwise it amounted to maintenance by the old law, to convey a title to any one, when the grantor himself was not in possession.

Such was the original method of proceeding in ejectment, when the term was first began to be recovered; but one alteration by degrees begat another, and fiction was heaped upon fiction. During the exile of King Charles the Second, an entire new mode of proceeding in ejectment was invented, and introduced by Lord C. J. Rolle, and has been followed ever since by the court. It is therefore called the modern practice, in opposition

Introduction of present modern practice.

opposition to the ancient above described—a mere invention; but time and experience have proved it an invention for the advancement of justice. “In form,” says Lord Mansfield, “it appears as a trick between two, to dispossess a third by a sham suit and judgment; an artifice which would be highly criminal, unless the court converted it into a fair trial between the proper parties.”

Explanation
thereof.

The new method of proceeding in ejectment entirely depends on a string of legal fictions; no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant, but all are merely ideal, for the sole purpose of trying the title. To this end, in the proceedings, a lease for a term of years is stated to have been made by him who claims title, to the plaintiff, who is generally an ideal fictitious person who has no existence. In this proceeding, which is the declaration, for there is no other process in this action, it is also stated, that the lessee, in consequence of the demise to him made, entered into the premises; and that the defendant, who is also now another ideal fictitious person, and who is called the casual ejector, afterwards entered thereon, and ousted the plaintiff; for which ouster the plaintiff brings this action. Under this declaration is written a notice, supposed to be written by this casual ejector, directed to the tenant in possession of the premises; in which notice the casual ejector informs the tenant of the action brought by the lessee, and assures him, that as he the casual ejector has no title at all to the premises, he shall make no defence; and therefore he advises the tenant to appear in court at a certain time, and defend his own title, otherwise he the casual ejector will suffer judgment to be had against him, by which the actual tenant will inevitably be turned out of possession.

The declaration is then served on the tenant in possession, with this friendly caution annexed to it, who has thus an opportunity of defending his title; which if he omits to do in a limited time; he is supposed to have no right at all; and, upon judgment being had against the casual ejector, the real tenant will be turned out of possession by the sheriff.

But if the tenant applies to be made a defendant, it is allowed him upon this condition, that he enter into a

rule

rule of court to confess at the trial of the cause three of the four requisites for the maintenance of the plaintiff's action, viz. the lease of the lessor, the entry of the plaintiff, and the ouster by the tenant himself, who is now made defendant instead of the casual ejector; which requisites, as they are wholly fictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited at the trial for want of evidence; but by such stipulated confession of lease, entry, and ouster, the trial will stand upon the merits of the title only.

Upon this rule being entered into, the declaration is now altered by inserting the name of the tenant instead of the fictitious name of the casual ejector; and the cause goes to trial under the name of the fictitious lessee on the demise of *A. B.* (the lessor or person claiming title) against *C. D.* (the now defendant), and therein the lessor is bound to make out his title to the premises, otherwise his nominal lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if he makes out his title in a satisfactory manner, the judgment is given for the nominal plaintiff, and a writ of possession goes in his name to the sheriff to deliver possession. But if the now defendant fails to appear at the trial, and to confess lease, entry, and ouster, the nominal plaintiff must indeed be there nonsuited for want of proving these requisites; but judgment will nevertheless, in the end, be entered for him against the casual ejector; for the condition on which the tenant was admitted defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all; the consequence of which we have seen would have been, that judgment must pass for the plaintiff, and the tenant would have been turned out of possession. The same process, therefore, as would have been had, provided no conditional rule had been made, must now be pursued as soon as the condition is broken; but execution will be stayed, if any landlord, after the default of his tenant, applies to be made a defendant, and enters into the usual rule to confess lease, entry, and ouster.

Thus the practice of sealing leases upon the premises, and making an actual entry and ouster, are now dispensed

pened with, a more easy and expeditious method is adopted, while the same substantial justice is done to the tenant in possession, and proper notice given him by the service of the declaration; nor is there any hardship in compelling the defendant to enter into the rule of court, to confess lease, entry, and ouster, for they are mere formalities, and nothing to do with the merits of the case.

The great advantage, indeed, which has resulted from this fictitious mode is, that being wholly regulated by the court, it has from time to time been so modelled as to answer in the best manner every end of justice and convenience.

SECTION II.

Of the Proceedings in the Modern Action of Ejectment, and when it should be brought.

Requisites in modern action.

When it may or may not be adopted.

Having given a brief account of the origin of the present action of ejectment, and endeavoured to point out the distinction between the modern and ancient mode of proceeding, it may be proper to observe, that whenever the former method is adopted, it is necessary that there should be a tenant upon the premises, who may be served with notice of the declaration, and that in all cases where the premises are vacated and wholly deserted by the tenant, the party must resort to the old mode of proceeding, by sealing a lease upon the premises; (except in such cases between landlord and tenant, as fall within the statute of 4 Geo. 2. which will be treated of hereafter.)

Nor will the modern practice avail where the ejectment is brought to avoid a fine; for in such case it is necessary to prove an actual entry; the mere ordering a person to deliver a declaration in ejectment to the tenant in possession will not amount to such an entry; but, in all other cases the confession of lease, entry, and ouster, by the common consent rule, is sufficient.

By

By the 21 Ja. 1. c. 10. ejectment must be brought within twenty years after the title or right of entry accrued. Therefore if the lessor or plaintiff be not able to prove himself or his ancestors to have been in possession within twenty years before action brought, or to account for the want of it under some of the exceptions of the statute of limitations, he shall be nonsuited. And if a declaration in ejectment be delivered within twenty years, and a trial had, whereby there is lease, entry, and ouster confessed, yet if the plaintiff, being nonsuited in that action, bring another after twenty years, that will not be proof of an entry to bring it out of the statute; for it must be an actual entry. *Caf. K. B. 573. Burr. 2604, Fairclaim dem. Empson v. Shackleton.*

Of statute of limitations.

Twenty years adverse possession is a positive title to defendant. It is not merely a bar to the action or remedy of plaintiff, but takes away his right of possession. *Taylor dem. Atkyns v. Horde, 1 Burr. 119.*

Construction thereof.

After twenty years want of possession therefore in plaintiff, or those under whom he claims, this possessory action of ejectment cannot be brought; but if there be any remedy, it must be by real action, as writ of right or the like.

What remedy if statute attaches.

And by 4 & 5 Ann. c. 16. s. 16. no claim or entry shall be of force to avoid a fine levied with proclamations, or shall be sufficient within the stat. 21 Ja. 1. of limitations, unless the action be commenced within one year after making such entry or claim. And the plaintiff must not lay his demise antecedent to his entry. 2 Stra. 1086, *Berrington v. Parkhurst.*

Of limitation when fine levied.

By the 4 Hen. 7. c. 24. not only all parties and privies to a fine, and their heirs, but all strangers whatsoever, are bound by a fine duly levied and passed, after five years after proclamations made are passed, except feme covert, infants, prisoners, persons beyond sea, and such as are not of whole mind, who have five years allowed to them, after the death of their husbands, their attaining full age, recovering their liberty, returning to England, or being restored to their right mind.

How fine operates.

2. Of the Declaration and Notice, and of the Service thereof.

The proceedings in K. B. may be either by bill or original, but the latter are preferable, as no writ of error can be brought thereon except in parliament.—In C. B. they are always by original.

The declaration and notice are the first process, no writ being previously sued out.

Prepare declaration upon treble *1d.* stamp paper (the names of both plaintiff and defendant who is the casual ejector, being fictitious); subscribe thereto a notice, directed to the real tenant in possession, for him to appear and defend his title to the premises, or else that the defendant (the casual ejector) will suffer judgment to be signed against him by default, and he (the tenant in possession) will be turned out of the premises. Serve an exact copy of this declaration and notice (upon the like treble *1d.* stamp) on the tenant in possession. If there be several tenants, serve copy on each, but keep original declaration in your own possession.

If the premises lie in London or Middlesex, make the notice to appear on the first day of the next term to that of which the declaration is entitled; otherwise, if made generally, the tenant will have the whole of the next term to appear in.

But if the premises lie in any other county, the notice should be to appear the next term generally.

A copy of the declaration, and notice thereon, must be delivered personally to the tenant or his wife, to whom, at the time of delivery, the notice should be read over, or the contents and meaning thereof explained. But see the following

OBSERVATIONS.

Ejectment local. Ejectment is a local action, the *venue* must be where the lands are situated.

As

As it is a possessory remedy, the plaintiff must shew a right of possession as well as property. *Taylor dem. Atkins v. Horde*, 1 Burr. 119. What plaintiff must shew.

This right must exist at the time of making the pretended lease, mentioned in the declaration, otherwise how can it be supposed that he had a power to make such lease? it follows therefore, that the demise in the declaration must be laid after the title of the lessor of the plaintiff has actually accrued, or he will be nonsuited; and the commencement of the pretended lease should be laid precedent to the ejectment by defendant. 1 Sid. 8. *Goodtitle dem. Galloway v. Herbert*, 4 D. & E. 680. How demise must be as to time.

For the same reason where the ejectment is to avoid a fine, the demise must be laid subsequent to the actual entry, because it is only from the time of the entry that plaintiff has a right of possession. *Berrington v. Parkhurst*, 2 Str. 1086. *Oates dem. Wigfal v. Brydon*, 3 Burr. 1897. *Musgrave v. Shelby*, 1 Wil. 214.

The demise was laid on the effoin day of the term, plaintiff had a verdict; and in arrest of judgment it was said, that the effoin day is in law accounted the first day of term, and the demise being laid on that day, the ejectment was brought before plaintiff had a cause of action. But *per cur.* the action and the wrong may be on one and the same day; and this being by original, may be sued out after the commencement of the term, and returned; but admitting it to be a slip, the defendant should have taken advantage of it on *oyer*. 3 Salk. 8, *Rogers v. Mearsbey*.

In ejectment, on the demise of an heir by descent, the demise was laid on the day his ancestor died, and held to be well enough. 3 Wils. 274, *Roe dem. Wrangham v. Hersey*.

So the declaration in ejectment must shew a good demise.

Thus if there be several lessors, and it is laid in the declaration that they demised, you must shew such a title in It must be a good demise so as to appear legal;

in them, that they could demise the whole. Cro. Jac. 166.

as to the parties
lessors.

If therefore lessors of plaintiff are tenants in common, there ought to be a different count on the demise of each tenant in common; or they may join in a lease (and if there are many it is the better way) to a third person; and that lessee make a lease to try the title; for tenants in common cannot make a joint lease. 2 Wils. 232; *Heatherley dem. Worthington and Tunnudine v. Weston*.

But joint tenants are seised *per my & per tout*, that is, each has an undivided moiety of the whole; and therefore each may be said to demise the whole.

So of *coparceners*, for they stand on the same foundation. *Vide Bull. Ni. Pri. 107.*

As to the mode
by deed if necessary;

And if it be necessary, either from the character of the party suing, or the nature of the thing claimed, that the lease should be by deed, the declaration should state a demise by deed; not that such a demise need be proved, for by the consent rule it is confessed, but the form of the declaration should accord with plaintiff's real title.

Thus in ejectment for tythes, which it is said can only be demised by deed. *Swadling v. Piers*, Cro. Jac. 613.

Or where a corporation aggregate was plaintiff. *Carth. 390, Patrick v. Ball.*

or by rent reserved.

Or where the lessor of plaintiff be an infant, in which case it used to be held, that the demise should be stated by deed, and also rendering rent.

But Q. if necessary.

But these authorities seem now greatly shaken, if not overthrown, by the cases of *Partridge and Ball*, *Ld. Ray. 136.* where C. J. Holt said the case of *Swadling v. Piers* was not law; and it was held (after verdict), that the demise by a corporation was good, though not by deed; and the cases in 3 Burr. 1806, and 2 D. & E. 161, which have settled that an infant may make a lease without rent to try his title.

So

So, upon the demise of a master and fellows of a college, dean and chapter of a cathedral, master or guardian of an hospital, parson, vicar, or other ecclesiastical person, of any lands, &c. the declaration should state, that there was a rent reserved, &c. pursuant to the statute 13 El. c. 10. R. Sav. 129.

But Q. now.

It was formerly held, that if a demise was laid in the declaration for a longer term than the lessor had interest in the premises, the plaintiff could not recover, *per Hale*, Tr. 27 Car. 2. But upon an objection made at *in pri.* where the demise was laid for a longer term than the lessor had title; and 2 Leo. 140. Brown, 133, were cited in support of it, Lord Mansfield said, "There is nothing in the objection, for if the lessor have a title, though but for a week, he ought to recover; for the true question in ejectment is, Who has the possessory right? Suppose a person has an interest for three years only, and should make a lease for five, it would be good for the three years." Bull. Ni. Pri. 106, *Emerson v. Tuckbird*, 1 Ray. 728.

How the term may be laid.

In case of a tenancy from year to year, as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land, which his intestate had. And the lessee of such an administrator may declare in an ejectment on a term for seven years. 3 D. & E. 13, *Doe dem. Shore v. Porter*.

In what cases errors in this respect are cured by a verdict. See *post* G—J.

To the declaration should be subscribed a notice directed to the real tenant in possession, desiring him to appear at the time mentioned therein, or judgment will go by default.

Of the notice to declaration.

The notice should strictly be signed by the casual ejector's (which is the nominal defendant's) name. Bar. 172, *Peaceable v. Troublesome*.

How signed.

But it is now held good, though signed by the nominal plaintiff's name. *Harlewood v. Thatcher*, 3 D. & B. 351.

The

At what day to appear.

The notice in ejectment was to appear on the effoin day of the term, and held ill; for it should be to appear the first day in full term, which is the first day in term. Stra. 1049, *Holdfast v. Freeman*.

No need of prothonotary's name to declaration.

Declaration good though served without prothonotary's name upon it. *Roe v. Doe*, *Holdfast v. Laga*, Bar. 192, 193.

Of the delivery of declaration.

All declarations in ejectment must be delivered before effoin day of every term. *Roe dem. Bird v. Doe*, Bar. 172.

Reason of service of declaration.

As the declaration is the first process in ejectment, and is to answer the end of a notice or warning to the tenant in possession, that proceedings are commenced against him to turn him out of his farm, common justice requires that he should be properly served with such process and acquainted with the meaning thereof.

Upon whom to be served.

The service of the declaration therefore, should regularly be upon the tenant himself, and the notice should be read over and explained to him at the time. But a delivery to his wife will do. 2 Blac. 800.

Tenant or his wife.

How if that cannot be effected.

Personal service upon the tenant or his wife, is good any where: otherwise it should be upon the premises. If the declaration be served upon the tenant or his wife as above, and defendant does not appear, an affidavit of such service may be made, and judgment signed as hereafter mentioned. But it often happens that such service cannot be effected; that the tenant is absent from home, or secretes himself, or the like, and that the declaration is left with one of his family or his servant; in these cases, the circumstances should be mentioned to the court upon the motion for judgment against the casual ejector, and whenever it appears upon the affidavit that the tenant afterwards received the declaration, and that he knew the meaning thereof, the court will be satisfied in the first instance. But if the circumstances of the service are more special, and out of the common way, it is then necessary to move for a rule to shew cause, why the service mentioned in the affidavit should not be deemed good service.

Special circumstance must be mentioned to court.

When allowed as good service.

This motion may be made either after the service, or if the plaintiff is aware of the difficulties he shall meet with, he may state them, and move, prior to the service, that a service of such a nature should be sufficient. 1 Blac. 290, *Metbold v. Knight*. *Gulliver v. Wagstaff*, 1 Blac. 317.

At what time motion to be made.

It is needless to recite the various cases in which services, otherwise irregular have from peculiar circumstances, been rendered good by rules of court. This is merely a discretionary power in the court exercised according to the exigency of the case.

What service shall be deemed good.

A tender of the declaration, and reading the notice aloud, though tenant refuses to receive it; or runs away and shuts the door; or threatens with a gun to shoot the person serving it, if he came near: so throwing it in at the window; sticking it against the door; or leaving it at the house; upon the servants refusing to call their master, and the like; have upon applications been rendered good. Stra. 575. Bar. 185. 188. 178. 174, 180. 176. 192. 190. 173. *Sprightly v. Dunch*, 2 Burr. 1116.

So, a tender and reading notice aloud in the shop to the wife of tenant, who refused to receive it, is good. See dem. *Neale v. Roe*, 2 Wil. 263.

Service of a declaration in ejectment before the effoin day of the term on the daughter of the tenant in possession, in the absence of the tenant and his wife, is good; provided it appears that the daughter delivered it to the wife, though it should not appear that such delivery was before the effoin day. *Smith dem. Ld. Stourton v. Hurst*, 1 H. Bl. 644.

The tenant was personated, at the time of the service, by another who accepted the service in the name of the tenant; and the court made a rule to shew cause, why it should not be deemed good service upon the tenant himself; and why judgment should not be signed against the casual ejector, on default of his appearing; and that leaving a copy of this rule at his house, with some person there, or if no one to be met with, affixing it on the door, should be good service thereof. Which rule was made

How if tenant personated;

made absolute on a proper affidavit. 2 Burr. 1181, *Fennell v. Tyrrell* and another v. *Denn*.

or a lunatic.

On affidavit, that one of the tenants is a lunatic, and that one C. lives with her, transacts her business, and has the sole conduct thereof, and of her person, but would not permit the deponent to have access to her, in order to serve her with the declaration; whereupon he delivered it to the said C. and a rule was made for the lunatic and C. both to shew cause, why such service should not be good; and service of the rule on the said C. to be good. Barnes, 190, *Doe v. Roe*.

Of service on churchwardens.

A declaration in ejectment served on the church-wardens and overseers of a parish, who rented a house for harbouring some of the parish poor, and did not otherwise occupy the house than by placing the poor in it, deemed sufficient service, and a rule made for judgment. Barnes, 181, *Turner* dem. *Mercer v. Doe*.

B. Of Judgment against the casual Ejector.

If no appearance, judgment by default.

When the declaration has been properly served, it is incumbent upon the tenant if he means to defend his possession to enter an appearance, or if he only holds under another, to give such landlord notice of the ejectment, who may, either with the tenant, or in his stead, be admitted a defendant; but if no appearance is entered, either by the tenant or any other person interested, judgment may be signed against the casual ejector by default.

And in order to compel an appearance, or to entitle himself to such judgment against the casual ejector, it is necessary for the plaintiff to proceed as follows:

How to proceed to entitle plaintiff to such judgment.

Make affidavit of service of copy of declaration, on treble *6d.* sworn before judge or commissioner; annex affidavit to the original declaration in your own custody, give it to counsel with brief to move for judgment; if the service was in the common way upon the tenant or his wife, and the affidavit is regular, it is only a motion of course, signed and given in with the affidavit to clerk of rules in B. R., or secondary in C. B. But if service be out of the common way, the circumstances should be mentioned to the court.

as before mentioned, *B.* Before making this motion, take a copy of the declaration, to make up the issue from, in case defendant should appear, and cause go on to trial.

Upon this motion a rule *nisi* * is granted, that unless tenant appear within the time mentioned in the rule, judgment shall be had.

The time for making the motion, as also the time allowed for defendant's appearance, is governed by the locality of the premises, and the time mentioned in the notice when defendant is to appear. Of the time for appearance and moving for judgment.

K. B.

If the premises lie in London or Middlesex, and notice in declaration be for tenant to appear on the first day, or within the first four days of the next term, plaintiff should move on that day, or at furthest in the beginning of the term, and the tenant has but four days inclusive afterwards to appear in.

If moved late in term, court will not allow more than two or three days, but if not moved before the four last days of term, he has until two days before the effoin day of the subsequent term.

But if notice of declaration be to appear generally, tenant has the whole term to appear in.

If the premises lie in any other county, though declaration be delivered before effoin day of Easter

C. B.

If premises lie in London or Middlesex, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector for default of appearance; unless such motion be made within one week next after the first day of every Michaelmas and Easter terms, and within four days next after the first day of every Hilary and Trinity terms. *R. T. 33 Car. 2.* If a town cause.

N. B. This rule does not extend to the case of a vacant possession under 4 Geo. 2.

If premises lie in any other county, the practice is the same as in country causes in *K. B.* If a country cause.
In

* The rule for judgment against the casual ejector in *K. B.* is drawn out in the following manner :

Saturday next after eight days of the Purification of the Blessed Virgin Mary, in the thirty-fifth year of the reign of king George the Third;

Then on the demise of Smith, Esq. against Fenn.—Unless John Bull, the tenant in possession of the premises in question, shall appear, and plead to issue on Thursday next after the end of the term, let judgment be entered for the plaintiff, against the now defendant Fenn, by default. And in the mean time proceedings to stay, upon the motion of Mr.

Let the rule be entered by the Court.

Easter or Michaelmas term, with notice to plead in those terms, yet tenant has till four days exclusive of the day on which term ends, after the end of the next issuable term, viz. Hilary or Trinity to appear in; and if in a county where assizes are but once a year, till four days after the issuable term preceding such assizes.

In this court, judgment against the casual ejector must be moved for, the same term in which notice was to appear.

Book of entry
of rules to be
kept.

By R. Mich. 31 G. 3. The clerk of the rules is to keep a book, in which is to be entered all the rules which shall be delivered out in ejectments, instead of that formerly kept which contained a list of the ejectments moved. The entry is to specify the number of the entry, the county in which the premises lie, the names of the nominal plaintiff, the first lessor of the plaintiff (with the words "and others" if more than one), and also the name of the casual ejector.

And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules, within two days after the end of the term in which the ejectment shall be moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment.

Of supplement-
tal affidavit.

It often happens that the affidavit of service of declaration is defective, in which case if the defects can be cured, a supplemental affidavit may be made, which take to clerk of rules, who will attend judge, and get an order to draw up rule.

In this court in country cases, plaintiff has the whole of the next issuable term, to move for judgment against the casual ejector. Runn. Ej. 166.

But in Imp. C. B. 651, a country ejectment may be moved any time in the term in which notice to appear is made, or on the last day of that term which is the same as in K. B.

If the tenant does not appear and plead within the time mentioned in the rule nisi, and which is allowed as above, no rule to plead need be given, but sign judgment against casual ejector as follows:

How to sign judgment against casual ejector.

K. B.

C. B.

Search the ejectment books at all the judges chambers for plea and rule; if none filed get rule for judgment of clerk of rules, 5s. make an incipitur of declaration on double 2s. 6d., and also on a roll; produce your rule for judgment, and clerk of judgments will sign it. Common bail must be filed for the casual ejector, R. M. 33 Car. 2.

Search plea book at prothonotary's for plea and rule; if none filed, draw up rule for judgment with secondary; make an incipitur of declaration on double 2s. 6d. stamp paper, and on a roll of that term, make out warrant for defendant; get it signed at warrant of attorney's office, pay for signing 8d., if not above four defendants; if five, there must be two warrants; if nine, three, and so on. Carry papers to prothonotary who will sign judgment, pay 12s. 8d.

Make out writ of possession on 6d. stamp parchment, get it signed with signer of writs and sealed.

Make præcipe for the writ of possession; get sheriff's warrant; give it to sheriff's officer, who will execute same by giving possession of the premises to the plaintiff.

Make out writ of possession, and get warrant thereon, as in K. B. (only no præcipe necessary.)

That fiction upon which the proceedings in ejectment are founded, may not work injustice, and a person be turned out of possession without notice; the courts insist upon the affidavit of service, on which the motion for judgment is founded, being certain as to the person served, and that the tenant is tenant in possession. Barnard. 330, 429.

Affidavit of service must be certain.

Affidavit of service on A. B. tenant in possession, or his wife, not sufficiently certain as to either. *Birkbeck v. Hughes*, Bar. 173.

So, of service on the wives of A. and B., who, or one of them, are tenants, not good. *Harding v. Greensmith*, Bar. 174.

How if several tenants.

When several tenants have been served with copies of the declaration, if it is meant but as one ejectment, and to be followed by one judgment, one affidavit of the service of all is sufficient, annexed to the copy of one declaration. But if the ejectments are made several, so as to have separate judgments, writs of possession, &c. then an affidavit must be annexed to separate copies of the ejectment, of the service separately.

When defendant will be let in after judgment by default.

Although judgment against the casual ejector be signed, yet if no possession is given, or trial lost, it may on an affidavit of merits and payment of costs, be set aside. 1 Sal. 117. Str. 975.

What is a regular appearance, or such as will warrant plaintiff signing judgment by default. See *post* C.

C.

C. Of the Appearance of the Tenant or Landlord, of the Statute 11 Geo. 2, and of the Consent Rule.

For the time when appearance should be entered, see *ante* B.

Time of appearance how reckoned.

When any number of days are allowed, one is exclusive, and the other inclusive, and Sunday if the last is not reckoned; so that if by the rule, four days are allowed after term, and term ends on a Wednesday, the tenant has all Monday to appear in. Say. 303.

Of stat. 11 Geo. 2. as to tenants giving notice to landlord of ejectment served.

Though the declaration is to be served upon the tenant in possession, he being *prima facie* the person interested, yet in fact it often happens that some third person, under whom the tenant holds, is the real party whose title is impeached; and that the actual tenant in possession, would be often indifferent about the event of the cause, or perhaps might even connive at the plaintiff's proceedings, and assist him in getting judgment, did not the legislature guard against such collusion.

To prevent any such fraud, all tenants are obliged by the statute 11 Geo. 2. c. 19. s. 12. to give notice to

their landlords of a declaration in ejectment being delivered, under pain of forfeiting three years improved or rack rent of the premises so held and enjoyed by the tenant.

And moreover as the tenant in possession could not be compelled to appear and enter into the common rule, to become defendant instead of the casual ejector; so neither could the landlord alone, without joining with the tenant, enter into such rule, and be made sole defendant. To remedy this inconvenience, by sect. 13, of the same statute, it is enacted, "That it may be lawful for the court, where such ejectment shall be brought, to suffer the landlord to make himself defendant, by joining with the tenant, in case he should appear; but in case such tenant shall neglect or refuse to appear, judgment shall be signed against the casual ejector, for want of such appearance: but if the landlord, &c. of any part of the lands, &c. for which such ejectment was brought, shall desire to appear by himself, and consent to enter into the like rule, that by the course of the court, the tenant in possession, in case he or she had appeared, ought to have done; then the court, where such ejectment shall be brought, shall and may permit such landlord so to do; and order a stay of execution upon such judgment, against the casual ejector, until they shall make further order therein."

Of stat. 11 G. 2.
as to landlords
being made de-
fendants.

The appearance therefore may be either by the tenant himself (as when he is in possession of his own estate, or agrees with his landlord to defend the action, or it is an ejectment by the landlord against his tenant, or the like), or it may be by the tenant and the landlord jointly, or if the tenant refuses, it may be by the landlord alone.

By whom ap-
pearance may
be.

The appearance in all the above cases, is effected in the same manner, except only that in the two last counsel's signature must be got to a motion; which is a motion of course to admit the landlord to defend, either with the tenant or by himself if he refuses to appear, and a rule got from clerk of rules accordingly. Also, if tenant does refuse to appear, an affidavit of such refusal should be made.

How appear-
ance effected.

How to appear.

If the tenant or landlord or both appear, get a blank consent rule from a stationer, unstamped, or from the secondary in C. B. then fill it up, making the tenant or landlord defendant, or both as case may be, instead of the casual ejector, entitling the cause in the margin, and inserting the premises, as described in the declaration, or such part thereof as the party would wish to defend; then the attorney for the defendant signs his name at the bottom, leaving a blank space for the plaintiff's attorney to do the like [for this is rather an agreement between the parties, than the rule itself, which is drawn out by the officer], and engrosses the general issue on stamped paper, and afterwards annexes the same to the rule [and if there is a rule to admit the landlord defendant, either with the tenant or by himself, the tenant having refused, annex that also]; then file common bail, if by bill in B. R. with the clerk of the common bails; and if by original in B. R. enter the appearance with the filazer, who will mark it; or if in C. B. enter appearance with the proper filazer, who will stamp the rule; which being done there, if the proceedings are in B. R. you carry and leave this rule, &c. at any of the judges chambers; or if in C. B. you carry and leave the same with the protobonotary.

The form of the consent rule in B. R. is as follows:

Michaelmas term, in the 36th year of King George the Third.

Middlesex. Denn, on the demise of Smith, of four messuages, four barns, four stables, fifty acres of land, fifty acres of arable, fifty acres of pasture, twenty acres of wood, and twenty acres of underwood, with the appurtenances, situate in the parish of St. Mary, Illington, in the county of Middlesex. } It is ordered, by consent of the attornies of both parties, that John Bull [the tenant or landlord, as the case is] be made defendant, in the stead of the now defendant Richard Fenn, and do appear forthwith at the suit of the plaintiff, and file common bail [if by original, leave out these words], and receive a declaration in an action of trespass and ejectment, for the premises in question in this cause, and forthwith plead

thereto, not guilty; and upon the trial of the issue, confess lease, entry, and ouster, and insist upon the title only; otherwise, let judgment be entered for the plaintiff, against the now defendant Richard Fenn, by default.

fault; and if, upon the trial of the issue, the said John Bull shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his bill [or if by original, his writ] against the said John Bull, then no costs shall be allowed for not prosecuting the same; but the said John Bull shall pay costs to the plaintiff in that case to be taxed. And it is further ordered, that if, upon the trial of the said issue, a verdict should be given for the said John Bull, or it shall happen that the plaintiff shall not further prosecute his said bill [or writ], for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff shall pay to the said John Bull his costs in that behalf to be adjudged.

By the court.

O. P. for the lessor of the plaintiff.

I. M. for the defendant.

How to appear for Part.

Formerly the rule used to be drawn generally, that A. B. be admitted, for so much of the premises as are in his or his undertenants possession, and plaintiff was obliged to distinguish by proof what premises were in each tenant's possession; or it specially described the premises defended; at the discretion of defendant. This occasioned the rule of Trin. 15 Ca. 2. whereby defendant's attorney was ordered to give plaintiff's attorney notice of the tenements he defended for,

But now the practice is to insert in the margin of the consent rule the premises to be defended, saying, that they are part of the premises mentioned in the declaration, which makes the rule special, and thereby supercedes the necessity of plaintiff's proving, in whose possession the lands are.

When the appearance is for part, the plaintiff may sign his judgment against the casual ejector for the residue.

But that the lessor of the plaintiff may the better know what exact part of the premises are defended, the

defendant's attorney should give notice to plaintiff's attorney what the premises are. Thus

In the King's Bench, } Denn, on the demise of Smith
or Common Pleas. } Fenn, against

Sir,

Take notice, that I defend for a messuage or tenement, a garden and stable [specifying the particular premises], situate in the parish of St. Mary, Illington, now in the possession of the said John Bull, or his under-tenant.

Dated this day of 1796,

Your's, &c.

I, M. defendant's attorney,

To Mr. O. P. plaintiff's attorney.

OBSERVATIONS.

- §. 1. Of the Construction of Statute 11 Geo. 2.
- §. 2. Of the Appearance and Plea, and when regular or not.
- §. 3. Of the Effect and Operation of Consent Rule,

§. 1.

- §. 1. Of the Construction and Operation of Stat. 11 Geo. 2.

The two sections of this statute which chiefly relate to the present subject are the 12th and 13th.

In what cases tenants must give notice of ejectment to their landlords.

The 12th section compels tenants to give notice to their landlords of ejectments served upon them. This only extends to cases where ejectments are brought inconsistent with the landlord's title.

It does not attach therefore upon the tenant of a mortgagor, who omits to give him notice of an ejectment.

ment brought by the mortgagee, in order to enforce an attornment. *Buchley v. Buchley*, 1 D. & E. 647.

The 13th section enables the landlord to be made defendant either with the tenant, or in his stead, if he refuses to appear. Of the landlord being made defendant.

Before the passing of this act, as appears clearly by what Mr. Justice Wilmot and Lord Mansfield said in *Fowler v. Shantille*, 3 Burr. 1290., it was the practice to admit the landlord and the tenant in possession, co-defendants. C. J. Holt said (Salk. 257. 7 Mod. 70.), it was due of right to the landlord to be made defendant; and all those who stood behind the tenant in possession, were entitled to come in and be received *pro interesse suo*, to defend the possession. The landlord used also to defend alone. How the practice was before the statute.

But by the case of *Goodright v. Hart*, Str. 830. the former practice as well as decisions, were not attended to, the court refused to let in persons who stood behind the tenant in possession to defend, instead of the tenant. This was a case, said Lord Mansfield, very little considered, but it certainly occasioned the clause in the act of parliament relative to this subject. Every reason of private justice and public convenience, and every authority was the other way. What occasioned the act.

In fact therefore this statute rather established an old right, than created a new one. Its effect.

Yet we find, that immediately after the passing of this act, a limited and narrow construction was endeavoured to be put upon it. How at first construed.

In the case of *Roe dem. Leake v. Doe*, Bar. 1793., where the lessors of plaintiff claimed title as devisees under one will, and A. B. and C. D. claimed title under another will; and upon the tenant refusing to appear applied to be admitted defendants. The court refused, saying, this motion is founded on the act 11 Geo. 2., and that they had no jurisdiction to admit any person to defend an ejectment instead of the tenant, except the landlord only. And who is landlord within the act? As confining the jurisdiction of the court.

Not every person claiming title, but one who is in some degree of possession, as receiving rent, &c.

So a mortgagee, who had never received the rent, was refused to be admitted. *Jones v. Williams*, Tr. 15 Geo. 2.

When a different construction began to prevail.

But Lord Mansfield in *Fairclain v. Shamtitle* said, he did not understand the note in Barnes, "It puts," says he, "the refusal of the motion upon want of jurisdiction; whereas in ejectment the court can never want jurisdiction to prevent the plaintiff from recovering without a proper trial. An ejectment is the creature of Westminster Hall, introduced within time of memory, and moulded gradually into a course of practice by rules of the court. The same authority which brought it thus far, may certainly carry it to a higher degree of perfection, as experience points out either inconveniences or defects." The act of 11 Geo. 2. was drawn and brought in by Sir John Strange; the provisions therein relative to proceedings in ejectment, were either to enforce a right practice or occasioned by some case contrary to the general sense of the bar, which the legislature virtually condemns as erroneous. In Stra. 1241, there is not a syllable about a mortgagee being refused to be admitted to defend as landlord.

The true spirit of the statute.

The word landlord extended to all.

Claiming title consistent with the possession of the occupier.

But not in opposition thereto.

He then proceeds in the same case to consider the question upon a truly liberal ground. There are two matters, says he, to be considered, 1st. whether the term "landlord" ought not, as to this purpose, to extend to every person whose title is connected to, and consistent with, the possession of the occupier, and divested or disturbed by any claim adverse to such possession; as in the case of remainders or reversions expectant upon particular estates? 2dly, whether it does not extend as between two persons claiming to be landlords *de jure* in right of representation to a landlord *de facto*, so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other? Where a person claims in opposition to the title of tenant in possession, he can in no light be considered as landlord, and it would be unjust to the tenant to make him a co-defendant; their defences might clash. Whereas when there

there is a privity between them, the defence must be upon the same bottom, and letting in the person behind can only operate to prevent collusion.

And afterwards, at another time, he said, when a person applies to be made defendant in the room of the tenant, it is not necessary that he should be the actual landlord; it is sufficient if he have only an interest in the lands: it should seem therefore, that a mortgagee out of possession may be admitted to defend on the tenants refusal. *Runn. Eject. 181. (Edit. 1795.)*

An interest in the land sufficient.

Thus the statute of 11 Geo. 2. received a construction agreeable to its true spirit; and which seems to have been since adopted by the present chief justice.

The above construction now prevails.

For in the case of *Lovelock v. Doncaster*, 3 D. & E. 783. 4 D. & E. 122., upon a rule why *cestuique trust* should not be admitted to defend, being opposed on the ground that they had never been in possession, and could not be considered as landlords; Lord Kenyon said, — If the person requiring to be made a defendant under the act, had stood in the situation of immediate heir to the person last seized, or had been in the relation of remainder man, under the same title as the original landlord, I am of opinion, he might have been permitted to defend as a landlord, by virtue of the directions of the statute: — but here the very question in dispute between the adverse party and himself, is, whether he is entitled to be a landlord or not? and therefore we are not authorised to extend the proviso of the statute to such a case as this.

Extends to the heir or remainder man.

Not to *cestuique* trust.

But the court permitted a devisee in trust to defend as landlord. *Norris v. Doncaster*, 4 D. & E. 122.

But to a devisee in trust.

So, the heir at law or remainder man under the same title. *Id.*

So, an heir who had never been in possession. 1 *Doe dem. Thistlethwaite v. Roe*, 4 D. & E. 122.

If ejectment is brought by one claiming as heir of a copyhold, and the lord of a manor who claims by escheat *pro defectu heredis*, applies to be admitted defendant, either

How if heir of a copyhold brings ejectment, and lord

of manor, claiming by escheat, wishes to defend.

either with the tenant or alone, the court will direct the lord to bring ejectment against the heir, and the heir be admitted to defend. If the lord refuses, they will discharge his rule to be admitted; if the heir refuses, they will admit the lord to defend. *Fairclaim v. Shantille*, 3 Burr. 1290.

How a parson may defend for a chapel.

In ejectment for a chapel, the parson can only defend for a right to enter and perform divine service, Str. 914, *Martin v. Davis*; though before held otherwise. *Hillingworth v. Brewster*, Sal. 256.

Lessee cannot defend alone against his landlord.

The court will never suffer a lessee to defend alone against his landlord, or those claiming under him on a supposed defect of title. *Driver dem. Oxendon v. Lawrence*, 2 Blac. 1259.

When landlord defends alone instead of tenant, judgment must be signed against casual ejector.

Where landlord is permitted to defend without the tenant, judgment is always first signed against the casual ejector; the reason of which is, that under it, the plaintiff, if he obtain a verdict, may get possession of the premises sued for, which he could not do by virtue of a judgment against a person out of possession.

Why.

On motion for the landlord to defend upon the statute of 11 Geo. 2. the court objected, that this motion could not properly be made till after judgment signed against the casual ejector; and that an affidavit ought to be produced of the tenant's refusal or neglect to appear. To which it was answered, that after judgment signed against the casual ejector, the plaintiff might take possession. But the court held the affidavit to be necessary, and made no rule; declaring, that the intent of signing judgment against the casual ejector was only that the plaintiff, after having tried his cause against the landlord (the tenant not being a party), might have the benefit of his verdict, and take possession under the judgment, which, under such verdict, he could not. It seems reasonable (upon a proper affidavit) to grant a rule to shew cause, before judgment against the casual ejector can be signed, to prevent the ill consequences of taking possession immediately after. *Barnes*, 179, *Bigland v. Dobson*.

If upon an ejectment brought the tenant does not give notice to his landlord, but suffers judgment by default, the landlord upon application to the court will be permitted, notwithstanding judgment regularly signed, to come in and be made defendant, and the tenant for his neglect will be compelled to pay the lessor of plaintiff all the costs incurred. *Troughton v. Roe*, Burr, 1996.

Landlord let in after judgment when signed from tenants not giving notice.

If a material witness for defendant be also made a defendant, the right way is for him to let judgment go by default; but if he pleads, and by that means admit himself tenant in possession, the court will not afterwards, upon motion, strike out his name. But in such case, if he consent to let a verdict be given against him, for as much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant. Bull. Nj. Pri. 98.

How to proceed if a material witness be made defendant.

§. 2. Of the Appearance and Plea, and when regular or not.

A tenant is not obliged to appear in ejectment, though the landlord is ready to indemnify him. Bar. 173. Nor can an attorney, by order of the landlord, appear for the tenant. Bar. 39, 178. But such appearance and plea would be irregular, and ordered to be withdrawn.

Tenant not obliged to appear.

The appearance in ejectment should be entered of the term mentioned in the notice. And where the notice to appear was in Hilary, and the tenant entered an appearance in Michaelmas following, and did nothing farther, and plaintiff, finding no appearance of Hilary, and no common rule entered into or pleaded, signed judgment against the casual ejector, the court held it regular; but afterwards set it aside to try the merits. Barnes, 250, *Mason dem. Kendall v. Hodgson*.

Of what term appearance should be entered.

The tenants had the forenoon of the 29th of April in Easter term, to appear in. F. the landlord, moved to add himself to the tenants; but no appearance being entered, plaintiff, on the 30th, signed judgment against the casual ejector. The landlord afterwards, without disclosing

If judgment signed, it is too late for landlord to be made defendant.

disclosing to the court what had been previously done, applied for the conditional rule as a matter of course; and by virtue thereof, on the 1st of May, appeared alone without the tenants. Plaintiff moved to take out execution on the judgment, and on shewing cause, the judgment appeared to be regular, and the appearance out of time. Plaintiff offered to waive his judgment, if the landlord, who resided at Jamaica, would give security for costs; to which his counsel not consenting, the court made the rule absolute for leave to take out execution. Barnes, 186, *Roe dem. Hyde v. Dee*.

Mistake in plea of plaintiff's name not sufficient to entitle him to judgment.

In C. B. the plea of *Marshal and others*, landladies and tenants in possession, who had appeared with the filazer, and entered into the common rule, was left in the prothonotary's office, entitled with the true name of the cause; but by mistake in the body of the plea, the name of plaintiff's lessor was inserted (as the person complaining) instead of that of the nominal plaintiff. Plaintiff's attorney looking upon this plea as null and void, signed judgment against the casual ejector; which judgment was set aside, with costs, as irregular; the plea is properly entitled, and not a nullity. Barnes, 191, *Goodtitle dem. Gardner v. Badtitle*.

What in form does not amount to a plea.

In C. B. the agents for the tenants in possession entered their appearance with the filazer, and sent a note to plaintiff's agent that defendants plead not guilty. Plaintiff's agent signed judgment for want of a plea in form. The counsel for the tenants submitted to the court, that according to the words of the rule for judgment against the casual ejector, unless the tenants appear, a new declaration against the tenants should in strictness have been delivered before a plea in form could be required. Judgment set aside, with costs, Barnes, 270, *Goodtitle dem. Brymer v. Notitle*.

Of pleading to the jurisdiction.

The common practice of the court is, to receive motions for judgment against the casual ejector, *nisi*, &c. after the term is ended; and then, upon the common rule, the new defendant has no opportunity to plead to the jurisdiction, or to move for leave so to do.—But the court, on motion, will give leave to plead to the jurisdiction in ejectment. But Q. if the motion ought not to be, “That the tenant in possession, when made
“defendant,

"defendant, may have leave," &c. *Vide* 1 Blackf. Rep. 197.

Ancient *demesne* has always been held a good plea in ejectment. But application to plead it must be made within the four days. *Vide* Barnes, 194, 187. It ought to be pleaded in the first four days. *Id.* 331. Of plea of ancient *demesne*.

And there must be an affidavit, that the lands are holden of a manor, which manor is ancient *demesne*, that there is a court of ancient *demesne* regularly holden, and that lessor plaintiff has a freehold. *Doe dem. Rust v. Roe*, 2 Burr. 1046. and *vide* Tidd. 326. *Hatch v. Cannon*, 3 Wils. 51., *contra*. *Vide* *Goodright v. Shuffel*, 2 Ray. 1418.

So, a fine and non claim, or an accord and satisfaction, is a good title. Of fine and non claim of accord.

But such pleas, whether in bar or in abatement, are now seldom pleaded; for the defendant, if he appears, is generally bound by the consent rule to plead the general issue not guilty. General issue now the usual plea.

§. 3. Of the Consent Rule, its Operation, &c. §. 3.

The origin and meaning of the consent rule has been already shewn, *ante* Section 1., and the form thereof, *ante* §. p. 180. Consent rule.

The effect of the rule is to bring the matter to the mere question of the plaintiff's possessory title. Its effect.

By it, the defendant undertakes to plead not guilty, and to confess upon trial, lease, entry, and ouster, and to insist upon the title only.

In all cases except that of an ejectment brought to avoid a fine, (where there must be an actual entry, by a positive rule of law, and by the statute 4 Ann. c. 16. s. 16.) the confession of lease, entry, and ouster, is sufficient to bar a nonsuit for want of proof of actual ouster. It is sufficient therefore for an ejectment brought upon condition broken, *Hare v. Cater*, Doug. 463.; or in the When sufficient to take away proof of entry.
Not to avoid a fine.
But it is in ejectment for forfeiture;

or by one tenant in common against another.

the case of an ejectment by one tenant in common against another. *Wigfall v. Brydon*, 3 Burr. 1895.

Q. as to statute of limitations.

But Q. whether sufficient to prevent the operation of statute of limitations, or to enable a person who has recovered in ejectment, to maintain trespass for the mesne profits against one, who was occupier when the title accrued, but not at the time of the ejectment. Doug. 12, 485. Runn. Eject. 202. (Edit. 1795.)

So as to tenants in common.

As in the case of tenants in common, there is no occasion to prove actual entry and ouster, if defendant enters into the common rule as it is thereby confessed; if the fact be, that there has been no actual ouster, the defendant ought to apply to the court not to compel him to confess, or to permit him to do it specially; which the court will grant, where it is only matter of account, and the only ouster is by pernancy of the profits, without an actual obstruction of the other to occupy. 3 Burr. 1895.

If they dispute the title.

But where he disputes the title, he shall be compelled to confess. 7, Mod. 39.

How if plaintiff does not join in rule with landlord.

The landlord had applied to be made a defendant, and had entered into the common rule; but the lessor of plaintiff had not joined in the consent rule; and on motion to set aside a rule to reply (as he could not be forced to proceed against a person whom he had never accepted as defendant) the court held the rule to be regular, and that the nominal plaintiff might be *non-pressed* thereby; but being nominal, the defendant could have no costs. 2 Blackf. Rep. 763, *Goodright dem. Ward v. Badtitle*.

How rule to be enforced by attachment.

The common rule being made by assent of both parties, an attachment lies for the non-performance of it as of all other rules of court that are disobeyed and this is all the remedy which the parties on both sides have for their costs. Sal. 259. Runn. Eject. 202.

Whether defendant can put plaintiff to proof of tenant's possession.

Though the defendant confesses lease, entry, and ouster, yet some have said, he may deny being in possession of the premises, for which the plaintiff contends, and put him to prove it, which if he cannot, he must be nonsuited.

sued. So, in the case of *Smith v. Mann*, 1 Will. 220., where the landlord had been made defendant instead of the tenant, it was decided that the plaintiff must prove the tenant in possession; for the defendant does not by entering into the rule confess himself to be landlord of any premises, but of such as were in possession of his tenant. These positions may be disputable, unless in cases where there were several tenants, for it has been said (*Jesse v. Bacchus*, Sitt. K. B. Mich. 30 G. 2.), that if there be but one tenant defendant, the plaintiff need not prove him in possession; because if he be not, why did he enter into the rule. Runn. Eject. 293. (Edit. 1795.)

D. Of the Proceedings from Appearance to Trial.

D.

When the rule for judgment against the casual ejector is out, that is to say, when the time for appearance is out, the plaintiff's attorney must search at the chambers of the respective judges in B. R. for the defendant's plea (in case he has appeared) and consent rule. To which, after the judge with whom it was left has signed it, and the plaintiff's attorney given a receipt for the same, he signs his name over the defendant's attorney, and then carries it to the clerk of rules, who files it, and draws up the consent rule from it on stamp, of which rule the plaintiff's attorney makes a copy, and annexes the same to the issue, which is made up and delivered to the defendant's attorney for trial. But in C. B. when the defendant has appeared, and left the consent rule in the prothonotary's office, the plaintiff's attorney resorts there for it; and having signed his name over that of the defendant's attorney, he gets two rules from it, drawn up by the secondary on stamps, one for each party, and then the plaintiff's attorney makes up the issue, and delivers a copy thereof, with notice of trial, on the defendant's attorney, and proceeds to trial as in other cases.

How to search for plea.

To proceed on consent rule;

and make up issue, record, &c. for trial.

The issue is made up with the same memorandums, if proceedings by bill, and without any memorandum, if by original; as in other cases, so is the record; and the

the same time allowed for notice of trial, and if plaintiff obtain a verdict, costs are taxed, and judgment entered up, and execution sued out, as in common actions for which, under the different heads, see vol. I.

Issue must agree with declaration.

In making up the issue, it must agree with declaration as first delivered, except in defendant's name; unless an order for that purpose. *Ld. Ray. 1411, Bafin, Bradford.*

How if they differ.

And in case they should differ, defendant may obtain a rule, that the issue should be made according to the declaration delivered against the casual ejector. *lb.*

Of payment of issue money.

If defendants when they had appeared, did not pay the issue money, judgment used to be signed against them, but not against the casual ejector. *Bar. 253, Sawell v. Jolly.*

But now by the late rule it seems no such judgment is allowed. See ch. XIV.

©. Of the Trial and its Incidents.

©. 1. If Plaintiff has entered into Part of the Premises before Trial.

©. 2. In case of the Death of either Party.

©. 3. If there is a Variance between Issue and Record.

©. 4. If Defendant does not appear and confers.

©. 5. If several Defendants, and some only appear.

©. 6. If Verdict for Lessor of Plaintiff.

©. 7. If Verdict for Defendant.

©. 1.

©. 1. If Plaintiff has entered into Part of Premises before Trial.

Of pleading *puis darrein continuance*, if plaintiff entered into part.

If the plaintiff after issue and before trial enters into part of the premises, the defendant at the assizes may plead it as a plea, *puis darrein continuance*. *Moore v. Hawkins.*

Hawkins, Yelv. 180. Cro. Car. 261. Nor is it in the direction of the judge to reject it or not; he is bound to receive it, it is made part of the record, and the trial is stopped, for the plaintiff cannot reply to it at the assizes. 2 Will. 137. *Lovel v. Eastaff*, 3 D. & E. 554.

§. 2. In case either Party die.

§. 2.

The plaintiff has a right to proceed, both for the possession and the trespass; and therefore the death of the lessor (though only tenant for life) is no abatement; nor can it be pleaded *puis darrien continuance*, because the right is supposed in the lessee. Hob. 5. But if the plaintiff, in such case, insist to go on, the court will oblige him to give security for payment of the costs, in case judgment go against him. Stra. 1056, *Thrustout* dem. *Turner v. Grey* and another.

Of the death of plaintiff.

But if in such case plaintiff is nonsuited for want of defendant's appearing and confessing, the executor of lessor shall have no costs taxed on the common rule. *Thrustout v. Bedwell*, 3 Will. 7.

If when there are several defendants, one dies after issue joined and before verdict, the death should be suggested on the roll before trial, and a *venire* awarded to try the issues between the survivors. 1 Burr. 363, *Far v. Denn*.

Of death of defendant after issue and before verdict:

Though when the *venire* was awarded against both, and the verdict was against both, yet, upon suggesting the death of the one upon the roll after verdict, plaintiff had judgment for the whole against the other. Id. Ray. 717. See also the above case of *Far v. Denn*.

If either party die after the commencement of the assizes, though before trial, it is within the statute 1 Car. 2. c. 8. made perpetual by 1 Jac. 2. c. 17. s. 5. whereby it is enacted, "That in all actions personal, real, or mixed, the death of either party, between the verdict and judgment, shall not be alleged for error, so as such judgment be entered within two terms after such verdict."

After verdict.

Vol. II.

O

If

If judgment be signed, though it be not entered on the roll within two terms after verdict, it is sufficient. Sal. 8. Sid. 385.

And if after verdict, and before judgment, any motion is made, and argument takes place, and *pendente questione* the defendant dies, court on motion will give plaintiff leave to enter up judgment as of next term after verdict, *nunc pro tunc*. *Tucker v. Duke of Beaufort*, 1 Burr. 146.

Ⓒ. 3.

Ⓒ. 3. If there be a Variance between Issue and Record.

How to proceed if variance between issue and record.

If there be any material variance between the issue and record, defendant should still appear at the trial, and afterwards move the court to set aside the verdict for the variance. For if he does not appear and suffer plaintiff to be nonsuited for want of his confessing, he is out of court and cannot properly afterwards move to set aside the nonsuit; though upon such motion the court did on *payment of costs* grant the rule, *Jones dem. Thomas v. Hengeff*, Bar. 175.; and in another case stay the proceedings. *Larw v. Wallis*, Barnard. 156.

Ⓒ. 4.

Ⓒ. 4. If Defendant does not appear and confess.

Consequence of defendant's not appearing and confessing.

If upon the trial the defendant does not appear, and confess lease, entry, and ouster, agreeable to the rule of court, which he has entered into, the plaintiff must necessarily be nonsuited; but as it is owing to the defendant's disobedience to the rule of court, the reason of such nonsuit is specially indorsed on the *posse*, and it ultimately operates with respect to the plaintiff, as if, at the first instance, he had got judgment against the casual ejector by defendant's not appearing; and with respect to the defendant he is saddled with the extra costs.

How to proceed in such case at the trial.

The course at the trial in such case is, to call the defendant to confess, and his attorney if he be within the rule; and then to call the plaintiff and nonsuit him.

and pray to have it indorsed on the *possea*, that the nonsuit was for not confessing lease, entry, and ouster. If the cause is in the K. B. you must wait till the day in bank (which is the first day of the next term if a country cause), before you sign judgment; then sign judgment against the casual ejector on a double half crown stamp paper, as if there had been no appearance. But if in C. B., judgment may be signed immediately after trial before the day in bank, and writ of possession may be sued out, but the costs cannot be taxed till first day of term. Carry the judgment paper and consent rule with the *possea* to the master, or prothonotary; neither the rule nor *possea* need be stamped with a double half crown; costs will be taxed upon the rule; then make a copy thereof, serve defendant therewith, at same time showing him original rule, and demand the costs, which if not paid to lessor of plaintiff, he may on affidavit move for attachment.

How afterwards
in getting judgment.

Sue out execution of *habere facias possessionem* directed to sheriff of proper county, who will deliver possession of premises. See *post*. 19.

Of suing out
execution.

The same mode of proceeding is to be observed, whether the tenant himself defended, or landlord entered to the rule and was admitted in his stead; and the motion for judgment against the casual ejector in such a nonsuit, is absolute in the first instance. *Stykes v. Oakes*, Bar. 182. *Fenn v. Marriott*, Bar. 185.

Motion for
judgment absolute
in first instance.

It is observable that the two courts materially differ in their practice in this respect. In the King's Bench, judgment cannot be signed, nor execution taken out after a nonsuit for not confessing, until the day in bank, when the *possea* is returned. *Doe v. Copeland*, 4 D. & E. 19. Whereas, in the Common Pleas, the lessor of plaintiff is entitled to judgment and execution immediately. *Fairfax v. Bentley*, Hil. 27 Geo. 3. So that if ejectment come to trial in any sittings after Trinity term, and defendant does not appear to confess, the lessor of the plaintiff may get possession of his estate four months sooner, if his action be in the Common Pleas, than he could have done if it were in the

Difference of
practice in the
two courts in
this respect.

King's Bench. Surely a matter of such moment, if the courts cannot agree upon it, is worthy the interference the legislature.

¶ 5.

¶ 5. If several Defendants and some only appear.

How to proceed if some of defendants only appear.

If there be several defendants, and some of them do not appear and confess, the practice now is, to proceed against those who do appear, and to enter a verdict for those who do not appear, indorsing upon the *posse*, that such verdict is so entered for them, because they do not confess; upon which the lessor of the plaintiff as to them is entitled to judgment against the casual ejector, and to have execution as to those lands which were in the possession of those who did not confess. *Ld. Ray. 729. Bull. Ni. Pri. 98.*

Verdict against defendant A. who on the trial appeared, and confessed lease, entry, and ouster; the other defendants did not appear and confess; thereupon they, according to the usual practice in such case, were found not guilty. Plaintiff obtained leave to sue out an *habere facias possessionem* on the judgment against the casual ejector as to them, and got his costs taxed on the *posse*, for which costs he thereby could only have remedy against defendant A. He then moved that the prothonotary should tax his costs against B. (one of defendants who did not appear and confess), on the common rule, by consent entered into for him, whereon a rule was first made to shew cause, and afterwards absolute. *Barnes, 149, Thrushout dem. Wilson v. Foote.*

Defendant at the trial did not appear to confess, &c. a nonsuit happened; and afterwards the plaintiff's lessor, instead of taking his remedy for the costs taxed upon the common rule as he ought to have done, entered judgment against the casual ejector, sued out a *fi. fa.* against the defendant's goods, and levied his costs thereon, acting as special bailiff himself. An action being brought for this irregular levy in B. R., the defendant moved in C. B. to set aside the *fi. fa.* and the court ordered restitution to be made, and the defendant's costs to be paid by the lessor and his attorney.

and by consent the action in B. R. to be discontinued without costs, and no other action brought. Barnes, 182, *Goodright dem. Rowell v. Vice.*

§. 6. If Verdict for Lessor of Plaintiff,

§. 6.

If there be a verdict for plaintiff, tax costs and sign final judgment as in common cases, allowing four days for motion for new trial, or arrest of judgment; he may then have a *ca. fa.* or *fi. fa.* for the costs, and a writ of *habere facias possessionem* afterwards, or a writ of *habere facias possessionem* and *fi. fa.* together in one writ.

How to proceed if verdict for plaintiff.

§. 7. If Verdict for Defendant.

§. 7.

If a verdict is given for the defendant, or the plaintiff is nonsuited for any other cause than for the defendant's not confessing lease, entry, and ouster, the defendant must proceed to tax his costs on the *poslea* as in other actions, and sue out a *copias ad satisfaciendum* against the plaintiff, and if upon shewing the said writ under seal to the lessor of the plaintiff, and serving him with a copy of the rule by consent to confess lease, entry, and ouster, the lessor of the plaintiff does not pay them, the court will grant an attachment against him.

How if verdict for defendant.

If the plaintiff is nonsuited, he may pay the costs to which of the defendants he pleases. *Stra.* 516.

§. Of the Judgment in Ejectment.

A judgment in ejectment is a recovery of the possession (not of the seisin or freehold) without prejudice to the right, as it may afterwards appear between the parties. He who enters under it, in truth and substance, can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder; if he has a chattel interest, he is in as a termor, and in respect of the freehold, his possession enures according to his right. If he has no title he is in as a trespasser, and without any re-entry by the true owner, is liable to

Nature and operation of the judgment.

to account for the profits. *Taylor dem. Atkins v. Horde*,
1 Burr. 114.

On declaration
for more, plain-
tiff may recover
1 s. not vice
versa.

It is now settled that plaintiff shall recover according to his title, provided he demands more than he is entitled to; for the greater shall cover the less; but if less be claimed by the declaration, he can only have a verdict to the amount claimed. In a declaration therefore for the whole of any premises, a moiety may be recovered; but not *vice versa*. So that the safest way is to declare for enough. *Denn dem. Burges v. Purvis*, 1 Burr. 326.

How the judg-
ment must be
in such case.

But the judgment in such case must not be for a moiety only, but that plaintiff recover his term, and he must take out execution for no more than he has a right to recover. *Far v. Denn*, 1 Burr. 362.

How the entry
of judgment
must be if ver-
dict for all.

If the plaintiff has a verdict for all, the entry of the judgment is, that the plaintiff recover his term against the defendant of, and in the premises aforesaid, or that he recover possession of the term aforesaid; and formerly there need also to be judgment *quod defendens capiatur*. But there is no need of that now, as by stat. 5 & 6 W. & M. the *capiatur* fine is taken away. *Lindsey v. Clark*, Carth. 390. 5 Mod. 285.

If verdict for
part.

If the verdict be only for part, the judgment is, that plaintiff recover his term in (that part), and (as to the other part whereof defendant is acquitted) that plaintiff be in mercy, and that defendant go thereof without day. See Cro. Car. 178.

Why it must
not state that
he is acquitted
for part.

And although defendant be acquitted as to part, yet if the judgment were entered, "that defendant be acquitted as to that part," it would be error, because the judgment in this action is not final as in a writ of right, nor does it protect the defendant from any further suit, but only acquits him against the title set up by the plaintiff in the action; but as the plaintiff's demand was groundless, as to that part whereof the defendant was acquitted, the judgment as to that is, that the defendant goes without day; for the plaintiff as to that has no further cause to detain him longer in court. Cro. Eliz. 758.

As

As the judgment is possessory to recover the possession, if the term expires pending the suit, plaintiff cannot recover possession; because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record that his title to it is determined. Yet he shall have judgment for his damages since the trespass still remained, and the defendant unjustly withheld the possession at the time the action was brought. Co. Litt. 285. 4 D. & E. 683.

How if term expires during the suit.

As the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of by the verdict; but a variance between the verdict and judgment occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought.— As where the plaintiff had judgment, that he recover his term of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land (by which the judgment was larger than the verdict), and, because it appeared to be the misprision of the clerk, who had not pursued the verdict which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to suffer for his misprision, since the statute of 8 H. 6. c. 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

Verdict how it should be entered as the ground of the judgment.

What mistake therein cured.

If an ejectment be brought against baron and feme, and the plaintiff hath a verdict against both, and before judgment the husband dies, the plaintiff may, on the suggestion, have judgment against the wife; not only because this is a trespass committed by the wife, and that therefore she is punishable for her own act, which is injurious to another; but because, where the wife is found guilty of the ejectment, she must have obtained that unlawful possession, either jointly with her husband, and then it survives, or else she had the whole possession in her own right; and in either case the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband. Roll. Rep. 14. 2 Cro. Jac. 356.

Judgment had against the wife only, baron dying between verdict and judgment.

In other cases of the death of either party. See *ante*, §. 2.

6. Of new Trial and Arrest of Judgment.

Of the time to move.

The parties have the same time to move for a new trial, or in arrest of judgment in ejectment, as in other actions. See vol. I. c. 11. §. 2.

When new trial granted.

In what case a new trial shall be had. See vol. I. c. 11. §. 2.

How if verdict be good for part, and bad for part.

On motion for a new trial, on the judge before whom it was tried reporting, that the verdict (which was a general verdict for plaintiff) was good for part, and bad for part; a rule was made that plaintiff should take possession of that part of the premises only, as to which the judge reported in favour of the verdict. *Brooke dem. Mence v. Baldwin*, Barnes, 468.

What shall or shall not be sufficient ground to arrest the judgment.

If by any intendment a judgment in ejectment after a verdict can be made good, the court will do it. As where no error brought after judgment for plaintiff, that he recovers his terms, when the declaration was on two separate demises, by two different lessors of the very same premises, and for the very same term; and though objected, that the judgment being to recover his terms in the plural number, was wrong, as both the lessors could not have title to the same premises at one and the same time, the court affirmed the judgment. And the chief justice cited a case, Trin. 4 & 5 Geo. 3, *Fisher and Hughes*, where, upon three demises, by several lessors of the same premises, and judgment as to two demises, was entered for the plaintiff; and as to the other, for the defendant; the objection being, that there was judgment both for the plaintiff and defendant, yet the court held the judgment right. 1 Wils. 1. S. C. Stra. 1180, *Morris Bart. v. Barry*.

So, where after judgment to recover his term, when there were two demises of different lands, and error brought, and objected, that the judgment being in the singular number to recover his term, was wrong. *Per Cur.* The judgment is to recover his term *de & in tenementis*

mentis prædict. which *reddendo singula singulis* is well enough, for there is but one term in each part of the premises. Stra. 835, *Worral v. Bent* and another.

But where on motion in arrest of judgment, the words in the declaration being one messuage or tenement, which is too uncertain, as tenement is all a man holds, and after judgment, the sheriff cannot tell of what to deliver possession, the court made a rule to stay judgment till cause shewn, and afterwards judgment was arrested. Barnes, 173, *Makepeace v. Hopwood*.

The ejectment was brought for one messuage, with the appurtenances in the parishes of A. or B. or one of them; and though after a verdict for plaintiff, judgment was arrested for the uncertainty. Barnes, 184, *Goodright dem. Griffin v. Fawson*.

But now an ejectment for a messuage and tenement,

So, for a messuage or tenement is good after verdict. Doe dem. *Stewart v. Denton*, 1 D. & E. 11.

On motion in arrest of judgment, the demise being laid on a day not then arrived, held no objection. *Small dem. Baker v. Cole*, 2 Burr. 1159.

In ejectment against two defendants, the declaration was, that *he* entered instead of *they* entered; and on motion in arrest of judgment, the court at first held it to be bad, but afterwards ordered it to be amended on the authorities of Cro. Jac. 306. And plaintiff had judgment. Salk. 48, *Bishop of Worcester's case*.

Trespass and ejectment by original; motion in arrest of judgment upon a fault in the original (for a bad original is not helped by verdict); but the master certifying there was no original at all, the plaintiff had judgment, though in his declaration he recited an original. 1 Mod. 3, *Kedman v. Edolfe*.

In the declaration in stating the demise, the *ville* was committed where the lands laid, but in the subsequent part, the ejectment was stated to have been at Haswell. And it being moved in arrest of judgment, the court held, that

that it amounted to a sufficient certainty, that the lands lay in the *ville* of Hafwell, and discharged the rule. 2 Blackf. Rep. 706, *Goodright* dem. *Smallwood* v. *Stather*.

Verdict for an acre of land, described only as laid, though in fact there was a wall and porch, and part of a house built by it (by encroachment); held good. *Goodtitle* dem. *Chester* v. *Alker*, 1 Burr. 135.

A regular judgment may be set aside.

A regular judgment in ejectment may be set aside, both in B. R. and C. B. *Debbs* v. *Passer*, Str. 795.

Whether after verdict or by default.

And there is no distinction between a judgment in ejectment upon a verdict, and one by default; in the former the plaintiff's right is found, in the latter confessed. *Astin* v. *Parkin*, 2 Burr. 667.

D.

D. Of the Execution.

Plaintiff may enter without execution.

If the plaintiff has judgment to recover his term, he may enter without suing out an *habere facias possessionem*; for where the land recovered is certain, the recoverer may enter at his own peril, and the assistance of the sheriff is only to preserve the peace. 2 Sid. 156. 1 Roll. Rep. 213. *Noy*, 71. *Palm*. 263.

Practice otherwise.

The usual and regular way however is, to make out writ of *habere facias possessionem*, which is engrossed on a 2s. 6d. stamp parchment, and signed and sealed, and for which a *præcipe* is made out; it is carried to the proper sheriff's office, who makes out a warrant thereon, and will put lessor of plaintiff into possession.

Of the writ of possession.

[Appendix S.]

[For the form of writ of possession, see *Appendix S.*]

Has relation to the teste.

It has relation to the *teste*, therefore, if tested the last day of the preceding term, it may be sued out though the lessor plaintiff be since dead. *Doe* dem. *Boyer* v. *Roe*, 4 Burr. 1970.

What may be taken under it.

Under the writ of possession, it is at plaintiff's peril to take more than he is strictly entitled to, and he is to point out to the sheriff the particular premises which

Of proceedings thereon.

court

are to be taken in execution; if he should take more, court will on motion order it to be restored. 5 Burr. 2673, *Connor v. West*. 1 Burr. 638, *Cottingham v. King*. 3 Wil. 49. Bar. 191. And as the sheriff would also be answerable, he first takes an indemnity from plaintiff. Law of Eject. 110.

If there are several messuages in possession of different tenants, sheriff must go to all their houses and turn them out; the delivery of the possession of one tenement in the name of all, is not sufficient. 2 Roll. Ab. 880.

Ejectment will lie by the owner of the soil, for land which is part of the king's highway; for the owner of the soil has a right to all above and under the ground, except only the right of passage, and he may recover the land subject to the easement; and the sheriff must deliver possession subject to the easement. *Goodtitle dem. Chester v. Alker* and another, 1 Burr. 133.

How if ejectment was king's highway.

The words of the writ are, *quod habere facias possessionem*; so that there must be a full and actual possession given by the sheriff, and consequently all power necessary for this end must be given him; and therefore if the recovery be of a house, the sheriff may justify breaking open the door, if he be denied entrance by the tenant, because the writ cannot be otherwise executed. 5 Co. 91. b. Law of Eject. 108.

What kind of possession must be given.

If the sheriff turns out all persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession; and, after the sheriff is gone, there appears some persons to be lurking in the house, that is no good execution; and therefore the plaintiff shall have a new *habere facias possessionem*: because he never had execution. *Upton v. Wells*, Leon. 145. But 2. now.

If the execution goes to the sheriff for twenty acres, the sheriff must give twenty acres, according to the common estimation of the country where the lands are. Roll. Rep. 410.

An

Attachment
granted for not
giving posses-
sion according
to rule of court.

An attachment was granted absolute in the first instance, against the tenant in possession, on affidavit that he had been served with a rule of court, made absolute, for delivering up the possession, and had refused so to do. *Davies dem. Povey v. Doe*, East. 13 Geo. 3. 2 Blackf. Rep. 892.

Of restitution
ordered.

A judgment irregularly obtained was set aside, and the possession given upon the execution ordered to be restored. But the lessor of plaintiff (who held the possession) absconding, the rule became ineffectual; whereupon it was moved, on behalf of the late tenants, for a writ of restitution, which the court awarded accordingly. *Barnes*, 178, *Goodright dem. Russell v. Wright*.

When scire fa-
cias necessary.

If the plaintiff neglect to sue out his writ of possession for a year and a day after judgment, he must revive the judgment by *scire facias* as in other cases, or the court will award a restitution *quia erronee emanavit*. *Withers v. Harris*, 1 Sal. 258. *Ld. Ray*. 806. *Sid*. 351.

Unless the stay of execution is by consent of the parties, or defendant brings error, and is afterwards nonsuited. 6 Mod. 288. *Ld. Ray*. 807. 2 Sal. 238. *Bar*. 132. *Str*. 360.

But if the delay be by injunction, there must be a *sci. fa.* Courts of law not taking notice of chancery injunctions. *Winter v. Lightbound*, *Str*. 301.

Unless the party has taken out his execution within the year, and continued it down by *vic. non misit breves*, which may be done without a breach of injunction. *Salk*. 322. 6 Mod. 388.

Of proceeding
thereon.

If after judgment and before execution, defendant in ejectment dies, and a *sci. fa.* goes, it must be against the terretenants of the land (and the heir may come in as terretenant), and not against the executor, without naming him terretenant. *Doyley v. Walker*, *Carth*. 2. *Eyres v. Taunton*, *Cro. Car*. 225. 319. 2 *Keb*. 143.

3. Of the Writ of Error.

3.

It has been already observed that by the consent rule, defendant undertakes to appear, and receive a declaration; the necessity of an original writ therefore, if the proceedings are in the Common Pleas, is superseded; because as the tenant is to appear and receive a declaration, he cannot take advantage of the want of an original, unless in a writ of error; but when a writ of error is brought, the plaintiff must file an original, unless it be after verdict, when it is helped by stat. 38 El. c. 14.

How to proceed if error brought.

And as in the Common Pleas there is no need of an original (which is the same in B. R. when proceedings are by original); so in B. R. when proceedings are by bill, there is no necessity for a latitat or bill of ejectment; but the party must file bail before he can proceed, because the court has no authority to proceed in ejectment by bill, unless the defendant be in custody; but if a writ of error be brought, he must file a bill of ejectment, before errors are assigned. Run. Eject. 204.

The casual ejector cannot bring error being a mere nominal person; that writ therefore can only be brought after defendant has appeared, and confessed lease, entry, and ouster. *Orion v. Mee*, Bar. 189.

Casual ejector cannot bring error.

So, if the landlord be permitted to defend, a writ of error cannot issue in the name of the casual ejector. 2 Burr. 657.

But it is otherwise if the writ of error be from an inferior court, because they are not competent to proceed by a rule for confessing. Run. Eject. 421. 152. Or if an infant be tenant in possession, and judgment be against casual ejector, because there is no laches in him for not confessing. Ld. Ray. 93. 1 Keb. 705. 740.

Except from an inferior court.

Or if infant be tenant.

But when the landlord is admitted defendant under the stat. 11 G. 2., he may bring a writ of error, and it is a sufficient reason against taking out execution. Str. 1241. *Jones v. Edwards*, Bar. 208.

Q. If landlord, made defendant, may.

Though

Or whether he should not make his stand at another time.

Though it has been since said that the proper opportunity for the landlord to make his stand against the execution is, by shewing the error as cause against the plaintiff's motion, for leave to take it out. And if he omits this opportunity, execution regularly issued shall not be set aside. *George dem. Bradley v. Wisdom*, But. Rep. 757.

§.

§. Of Proceedings in K. B. by Original.

If the plaintiff proceeds in ejectment by original, he does not sue out his original writ at first, but proceeds by delivering his declaration as by bill; but if a writ of error should be brought, he must sue out his original writ, which must be returned by the sheriff, and filed in the treasury; or if the tenant has not appeared, the original must be sued, returned, and filed properly; and if he has appeared, then, on suing out the original, you must insert his name, instead of the nominal defendant.

The appearance, when by original in B. R. is entered with the filazer, in like manner as it is in other suits by original; and the writs are made out returnable on a general return day, as in other cases.

The *præcipe* for the curfitor, to make out the original writ by, is as follows:

Middlesex, to wit. If John Denn shall make you secure, &c. then put, &c. Richard Fenn, late of, &c. that he be before our lord the king, on wherefore, &c. to shew wherefore, with force and arms, he entered into four messuages, &c. [reciting the premises], with the appurtenances, in the parish of St. Mary, Islington, in the county of Middlesex, which William Smith demised to him for a term, which is not yet expired, and ejected, &c. and other enormities, &c. against the peace, &c. and to the damage, &c.

— January, 1796.

O. P.

SECTION III.

Of Proceedings in Ejectment in particular Cases.

A. Of Proceedings by Landlord against Tenant on 4 Geo. 2

B. Where the Premises are untenanted, and the Case is not within the Statute of 4 Geo. 2.

C. Of Proceedings by Mortgagee.

D. Of Proceedings by Corporations.

E. Of Proceedings in Inferior Courts.

F. Of Proceedings by and against Infants in Ejectment.

G. Of Proceedings by Landlord against Tenant on a Right of Re-entry under 4 Geo. 2.

One of the most usual and provident clauses in a lease is, that of giving the lessor a power of re-entry in case of non-payment of rent or the like; but as many niceties attended this re-entry at common law, even though the lessor upon the breach of the covenant was entitled to it, and much inconvenience was thereby occasioned, the legislature in favour of landlords enacted by the 4 Geo. 2. c. 21. s. 2. "That in all cases between landlord and tenant, as often at it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof; such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or, in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or

Statute 4 Geo.
2. c. 28.

" hereditaments, comprized in such declaration in eject-
 " ment, and such affixing shall be deemed legal service
 " thereof; which service or affixing such declaration in
 " ejectment shall stand in the place and stead of a de-
 " mand and re-entry; and, in case of judgment against
 " the casual ejector, or non-suit, for not confessing lease,
 " entry, and ouster, it shall be made appear to the
 " court, where the said suit is depending, by affidavit,
 " or be proved upon the trial, in case the defendant ap-
 " pears, *that half a year's rent was due before the said*
 " *declaration was served; and that no sufficient distress*
 " *was to be found on the demised premises countervail-*
 " *ing the arrears then due; and that the lessor or les-*
 " *sors in ejectment, had power to re-enter;* then, and
 " in every such case, the lessor or lessors in ejectment,
 " shall recover judgment and execution, in the same
 " manner as if the rent in arrear had been legally
 " demanded, and a re-entry made; and in case the
 " lessee or lessees, his, her, or their assignee or assign-
 " ees, or other person or persons claiming or de-
 " riving under the said leases, shall permit and suffer
 " judgment to be had and recovered on such ejectment,
 " and execution to be executed thereon, without pay-
 " ing the rent and arrears, together with full costs, and
 " without filing any bill or bills for relief in equity,
 " within six calendar months after such execution exe-
 " cuted; then, and in such case, such lessee, or lessees,
 " &c. and all others claiming and deriving under the
 " said lease, shall be barred or foreclosed from all relief
 " or remedy in law or equity, other than by writ of er-
 " ror for reversal of such judgment, in case the same
 " shall be erroneous; and the said landlord, or lessor,
 " shall, from thenceforth, hold the said demised premises
 " discharged from such lease: and if, on such ejectment,
 " verdict shall pass for the defendant, or the plaintiff
 " shall be nonsuited therein, except for the defendant's
 " not confessing, &c. then, in every such case, such de-
 " fendant shall have and recover his, her, or their full
 " costs: Provided always, That nothing herein con-
 " tained shall extend to bar the right of any mortgagee
 " or mortgagees of such lease, or any part thereof,
 " who shall not be in possession, so as such mortgagee,
 " or mortgagees, shall and do, within six calendar
 " months after such judgment obtained, and execution
 " executed, pay all rent in arrear, and all costs and da-
 " mages

Proviso as to
 mortgages.

damages sustained by such lessor, person or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements, which, on the part and behalf of the first lessee or lessees, are and ought to be performed."

By sect. 3. "A lessee, filing a bill in equity, shall not have an injunction, unless within forty days after the answer of the lessor, he brings into court so much as the lessor shall in his said answer swear to be due, over and above allowances and costs, there to remain till hearing, or to be paid to the lessor, subject to the decree of the court: and in case such bill shall be filed within the time, and after execution executed, the lessor of the plaintiff shall be accountable only for so much, and no more, as he shall really make *bonâ fide* of the demised premises from the time of his entering into possession; and if what shall be so made shall appear to be less than the rent reserved on the lease, then the lessee, &c. shall, before he be restored to his possession, pay to the lessor the deficiency."

As to filing bill in equity for an injunction.

Sect. 4. Provided, "That if the tenant, &c. shall, at any time before the trial in such ejectment, pay or tender to the lessor, &c. or pay into court all the rent and arrears, together with costs, then further proceedings on the ejectment shall cease; and if the lessee, &c. shall, upon the bill filed as aforesaid, be relieved in equity, such lessee, &c. shall hold the demised premises according to the lease thereof, without any new lease to be made thereof."

As to paying into court rent and arrears.

The above statement only relates to ejectment for non-payment of rent, where the landlord has a right to re-enter.

Its extent.

The true end of this act of parliament is to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession (from its remaining in the power of the tenant to offer him a compensation at any time, in order to found an application for relief in equity), and to limit and confine the tenant to six calendar months after execution executed, for his doing this; or else, that the landlord should from

thenceforth hold the demised premises discharged from the lease. *Doe dem. Hitchins v. Lewis*, Burr. 614.

What deemed a waiver of the forfeiture.

Courts of law always lean against forfeitures as courts of equity relieve against them; whenever therefore a landlord means to take advantage of any breach of covenant, so as that it should operate as a forfeiture of the lease, he must take care not to do any thing which may be deemed as an acknowledgment of the tenancy, and so operate as a waiver of the forfeiture.

Action on the covenant.

He must not therefore bring an action upon the covenant for payment of rent, which became due since the forfeiture accrued. *Doe dem. Crompton v. Minshull*, East. 33 Geo. 2. Nor must he accept such rent. Cow. 247.

Action of rent barred by acceptance of rent.

An action for double rent on this statute, for holding over, will be barred by an acceptance of rent accrued since.

Of tender of rent, or paying it into court after forfeiture.

But though the tenant has incurred a forfeiture under the statute, yet he may stay the proceedings either by tendering the rent, before an ejectment is delivered, *Goodright dem. Stevenson v. Noright*, 2 Black. Rep. 746.; or by moving to pay into court all the rent due, and costs, any time before writ of possession executed, even after judgment against the casual ejector. *Goodtitle v. Holdfast*, Str. 900. Cooke's Rep. 6. Anon.

Or it may be done by summons in vacation time.

The courts had permitted the tenant to bring into court the arrears of rent and costs, antecedent to this act. *Gregg's Case*, Sal. 597.

When allowed.

In ejectment by a landlord, the tenant moved to stay proceedings upon payment of rent, arrears and costs, according to sect. 4. of the above act. And, on a rule to shew cause, it was insisted for the plaintiff, that the case was not within the act, but that it was brought likewise on a clause of re-entry in the lease for not repairing; and the lease was produced in court. However, the rule was made absolute, with liberty for the plaintiff to proceed upon any other title. *Piere dem. Withers v. Sturdy*, H. 1752.

Lessors of plaintiff were both devisees and executors, and in each capacity rent was due to them. Defendant moved to stay proceedings on payment of the rent due to lessors of plaintiff as devisees, they not being entitled to bring an ejectment as executors. There appeared to be a mutual debt due to defendant by simple contract, and defendant offered to go into the whole account, taking in both demands as devisees and executors, having just allowances; which lessors of plaintiff refused. The rule was made absolute to stay proceedings, on payment of the rent due to lessors, as devisees, and costs. *Duckworth dem. Tubley and others v. Tunstall, Barnes, 184.*

If the lease specifies that a demand of the rent should be made, ejectment cannot be brought till such demand made, but without such stipulation, no demand is necessary; but only that six months rent should be in arrear, and no sufficient distress. *Goodright v. Cater Doug. 486.*

When demand of rent necessary.

In moving for judgment upon a declaration in ejectment delivered, or in case of no tenant affixed on the premises, according to this act of 4 Geo. 2. c. 28. the courts require an affidavit, that there was half a year's rent in arrear before declaration served, that the lessor of the plaintiff had a right to re-enter, that no sufficient distress was to be found on the premises countervailing the arrears of rent then due, that the premises were untenanted, or that the tenant could not be legally served with the declaration (as the case is), and that a copy of the declaration was affixed on the most notorious, and what part of the premises, or the court will not give a rule for judgment.

Of the affidavit under stat. 4 Geo. 2.

[For the form of the affidavit, see *Appendix S.*]

[*Appendix S.*]

This affidavit is only necessary upon moving for judgment against the casual ejector, or after a nonsuit at the trial for the tenant's not confessing lease, entry, and ouster.

When necessary.

But if the tenant appears, and the ejectment comes to a trial, all the matters of the above affidavit must be proved.

At a trial some facts must be proved.

proved upon the trial. Per *Dennison*, Just. in the case of *Doe dem. Hitchings v. Lewis*, 1 Burr. 614.

The late tenant, or other person, claiming title to the premises, has the same time to appear in as is allowed to tenants in possession.

Of the declaration.

The declaration in ejectment is prepared in the usual way, taking care to lay the demise after the forfeiture accrued.

Of proceedings after appearance, or in case of no appearance.

After appearance the proceedings are the same as in other cases; so in case of no appearance plaintiff moves for judgment against the casual ejector on the affidavit above-mentioned, and proceeds as in common ejectments.

Thus by the statute of 4 Geo. 2. where the case comes within it, there is no occasion for the landlord to make an actual entry, and seal a lease on the premises, which must be done in all other cases where the premises are untenanted, as will be presently shewn; nor is there any occasion to prove at the trial, any actual entry or ouster; if defendant appears, the common consent rule is sufficiently binding. *Hare v. Cator*, Doug. 483.

When the affidavit will be presumed.

Ejectment brought by landlord against his tenant, under 4 Geo. 2. c. 28. s. 2. and judgment had against the casual ejector by default, and possession thereupon delivered. Near twenty years after, the tenant brings an ejectment against the same landlord for the same premises. The landlord (who is defendant in this latter ejectment) is not obliged to produce such an affidavit as this clause requires, as an essential requisite previous to his original recovery, for, as it was essentially requisite, the court will presume, that there was one regularly then made, and that judgment was founded upon it. *Doe dem. Hitchings v. Lewis*, 1 Burr. 614.

B. Where the Premises are untenanted, and the Case is not within the Statute of 4 Geo. 2.

B.

In the first Section of this Chapter, we have endeavoured to shew the origin and meaning of the modern mode of proceeding in ejectment, and the distinction between that and the ancient method; from whence it may appear that the very ground work of the present practice, is, there being a tenant in possession, to whom a declaration as notice of the ejectment may be properly delivered; for if that circumstance fail and there be no tenant, or occupier, but the premises are vacated, the old way of proceeding must be still pursued, except in the single instance of landlord and tenant, provided for by statute 4 Geo. 2. just before treated of.

Proceedings to recover vacant premises must be in the old way, by sealing lease, &c.

This is done by entering upon the premises, and actually sealing a lease thereon, either in person or by attorney.

May be in person or by attorney.

If the former method is preferred, the proceeding is thus:

A. (the person claiming title) must go upon the land before the esoin day of the term, and there seal and deliver a lease to B. (any friend of his as tenant), and at the same time deliver him possession. This being done get C. (any other friend) to go upon the premises, and turn out B. the tenant, by thrusting him off the premises, and afterwards let C. (the ejector) remain on the premises, and whilst he continues there, serve him with a declaration in ejectment, in which make B. the tenant the plaintiff, A. (the person claiming title) the lessor, and C. (the actual ejector) the defendant, and declare on the demise in the lease, and subscribe a notice to appear as follows:

How to be done in person.

Mr. E. F.

Take notice that unless you appear in his Majesty's Court of King's Bench at Westminster next Trinity Term (or if a town cause, the first day of next Trinity Term), at the suit of the above-named plaintiff B. and plead to this declaration in ejectment, judgment will be thereon entered against you by default.

Yours, &c.

Same notice in C. B. *mutatis mutandis*.

Of the declaration.

The declaration is the same as usual, only the real persons are made parties, instead of fictitious names.

After service of declaration,

In K. B.

Of getting judgment.

An affidavit must be made of sealing the lease, and of the ouster by defendant, and of all the facts. [For form whereof see post. p. 215.] This is indorsed to move for judgment against the casual ejector, and unless defendant appears and enters into common rule, judgment may be signed as on a common ejectment.

In C. B.

There is no need of any affidavit, nor any motion for judgment, but on the first day of term give a rule to plead as in common actions, and if no appearance and plea at expiration of rule, sign judgment.

How by power of attorney.

If the landlord or person claiming title does not wish to enter himself and seal the lease, he may do it by attorney, in which case he may execute a power of attorney in the following form, and the proceedings are just the same; the attorney acting as the principal landlord.

The letter of attorney is to the following effect:

Form of power of attorney.

“ Know all men by these presents, that I A. B. &c. have made, ordained, constituted, and in my stead and place, and by these presents do make, ordain, constitute, and in my stead and place put C. D. of, &c. my true and lawful attorney, for me, and in my name to enter into and take possession of all, &c. in the tenure of, &c. and when he hath taken possession thereof, and for me, in my name, and as my deed, to seal and execute a lease of the said premises unto E. F. of, &c. to hold the same to him, his executors, administrators, and assigns, from last past, before the date hereof, for the term of years, at the yearly rent of a pepper-corn (if lawfully demanded), subject to a proviso, to be void on my tendering of 6d. to the said E. F.”

In witness, &c.

H. H. maketh oath, that he was present and did see A. B. of, &c. duly sign, seal, and deliver the letter of attorney hereunto annexed.

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Pr. I. Sec. III.] EJECTMENT.

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The lease referred to by the foregoing letter of attorney :

This indenture made, &c. between A. B. of, &c. of the one part, and E. F. of, &c. of the other part, witnesseth, that the said A. B. for and in consideration of the sum of five shillings of lawful, &c. to him in hand paid by the said E. F. at and before the sealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath granted, demised, set, and to farm let unto the said E. F. his executors and administrators, all, &c. now or late in the tenure of, &c. to have and to hold the said herein-before mentioned and hereby demised premises, with all and every their appurtenances, unto the said E. F. his executors, administrators, and assigns, from the last past, before the date of these presents, unto the full end and term of five years from thence next ensuing, and fully to be complete and ended, yielding and paying therefore, during the said term, unto the said A. B. or his assigns, the rent of one pepper-corn, at the feast of yearly (if lawfully demanded): provided always, and these presents are on this condition nevertheless, that if the said A. B. or his assigns, shall, at any time or times hereafter, tender, or cause to be tendered, unto the said E. F. the sum of 6d. that then and in such case, and from thenceforth, this indenture, and every thing herein contained, shall cease, determine, and be absolutely void; any thing herein contained to the contrary thereof in any wise notwithstanding.

The attorney is to write the name of his principal.

Scaled and delivered as the act and deed of the above-named A. B. by C. D. of, &c. by virtue of a letter of attorney to him for that purpose made by the said A. B. bearing date the day of this instant, being first duly stamped in the presence of

The form of the affidavit required of the proceedings in case of a vacant possession, is as follows: Form of affidavit.

H. H. of, &c. maketh oath, and saith, that he, this deponent, on, &c. now last past, did see C. D. of, &c. for

for and in the name of A. B. the lessor of the premises in this cause, severally enter upon and take possession of part of the premises in the deed hereunto annexed mentioned, by entering into the first of the said houses, and putting his foot on the threshold of the outer doors of two other of the said houses, the same being locked and uninhabited, so that no other entry thereon, or possession thereof, could be made or taken without force. And this deponent did then likewise see the said C. D. after such his entry into and upon the said premises, and whilst he was in such possession thereof as aforesaid, at each of the said houses, seal and deliver the lease hereunto annexed unto the plaintiff; and further saith, that after the said lease was so executed, this deponent did see the plaintiff take possession of the said three houses, with their appurtenances, by virtue of the said lease, by entering upon the threshold of the said outer doors of the said three houses, the same being then locked and uninhabited, and no other entry to be made therein, save as aforesaid; and this deponent saith, that immediately afterwards, the defendant did enter each and every of the said three houses, and turned the plaintiff out of possession thereof, by thrusting him out of the same; whereupon this deponent did then and there deliver and leave with the said defendant, a true copy of the declaration hereunto annexed.

Sworn, &c.

H. H.

This affidavit will do where there is no power of attorney leaving out that part.

To warrant the above proceedings, the premises must be vacant; they must be wholly deserted by the tenant; and the lessor of the plaintiff not able to find out where the tenant is to serve him with an ejectment.

What deemed
a vacant possession.

The lessee of a public house took another, and removed his goods and family, but left beer in the cellar. And there being rent in arrear, the landlord sealed a lease, as on a vacant possession, delivered an ejectment, and signed judgment, which was set aside, the lessee still continuing in possession. And a case was mentioned, where leaving hay in a barn at Hendon was held to be keeping possession. It further appeared in this case, that the

the attorney for the plaintiff knew, whither the lessee removed, and might have served him personally, which is not necessary to be done upon the premises. And in the case of renting ground, to which there is no house or barn, if it is known where the tenant lives, he must be served. *Savage v. Dent*, 2 Str. 1064.

In cases of a vacant possession, no person claiming title will be let in by the courts to defend, but he that can first seal a lease on the premises, must obtain possession. Bull. Ni. Pri. 96. And therefore the person claiming title, must resort to his new ejectment.

No person let in to defend.

Motion that B. and B. who claimed title to some lands and tenements in Middlesex (the possession whereof was vacant), might be informed by the attorney for the person, who was carrying on the proceeding in the old way, under a lease sealed on the premises, of the names of the parties in ejectment, in order that B. and B. might appear and defend the title. It was urged for the attorney, that in all cases of a vacant possession, unless such as are within the 4 Geo. 2. concerning landlords and tenants by lease, with a clause of re-entry, no instance can be shewn, where any person claiming title hath been let in to defend; but he that can first seal a lease upon the premises, must obtain possession, and any other person claiming title may eject him if he can: and by the course of the court, no defence can be made in these cases but by the defendant in the ejectment, who is a real ejector. *Barnes*, 177, *Ex parte Beauchamp and Burt*.

But in Imp. K. B. Pract. 537. it is said, any person claiming title to the premises, and who are usually admitted by the court, may with leave appear and enter into the common rule, upon motion made for that purpose.

But Q. now.

C. Of Proceedings by Mortgagee.

C:

The proceedings by a mortgagee are as in other cases, that is to say, whenever he has a right of entry, and the premises are tenanted, he serves an ejectment, and pursues the modern practice; but if the premises be vacant,

Of proceedings by mortgagee.

cant, he follows the ancient method by sealing a lease, as above described.

When he may proceed against the tenant and how.

As a mortgagor is considered as a tenant at will in the strictest sense to the mortgagee, who may be turned out without notice; if any lease be granted by him subsequent to the mortgage, without the privity of the mortgagee, the latter may eject the tenant without any notice to quit. *Keech v. Hall*, Doug. 21.

If to get possession of the premises.

But if subsequent to a lease granted, or even pending a tenancy from year to year, the mortgage is made; mortgagee must give six months notice. *Birch v. Wright*, 1 D. & E. 379.

If only into receipt of rents.

That is, if he wishes to gain possession; but if he only wants to get into the receipt of the rent and profits, there is no need of an ejectment; he need only give notice to the tenant, that he does not intend to disturb his possession, but requires the rent to be paid to him instead of the mortgagor; and if tenant refuses, he may distrain. *Moss v. Gallimore*, Doug. 282.; and this though the lease be prior to the mortgage.

Though formerly an ejectment was held necessary to get into receipt of the rents. Bull. Ni. Pri. 96.

In ejectment of tenants of the mortgagor, he defended, and plaintiff only proved the mortgage, and such proof was held not to be sufficient; for he should have proved the lands in possession of the persons to whom the ejectments were delivered, as the defendant only admits himself landlord to them of lands in their possession. 2 Crompt. Prac. 194.

Of 7 Geo. 2. c. 20. and paying principal and interest to mortgagee in case of ejectment brought.

By the 7 Geo. 2. c. 20. An act for the more easy redemption and foreclosure of mortgages, after reciting, that "mortgagees frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagers to pay the money secured by such mortgages, and for performing the covenants therein contained; and likewise commence suits in equity, to foreclose their mortgagers from redeeming their estates; and the courts of law, where such ejectments are brought,

" have

“ have not power to compel such mortgagees to accept
 “ the principal monies and interests due on such mort-
 “ gages and costs, or to stay such mortgagers from pro-
 “ ceeding to judgment and execution in such actions,
 “ but such mortgagers must have recourse to equity for
 “ that purpose; in which case likewise, the courts of
 “ Equity do not give relief until the hearing of the
 “ cause:” For remedy, &c. it is enacted, “ That where
 “ any action shall be brought on any bond, for pay-
 “ ment of money secured by such mortgage or per-
 “ formance of the covenants therein contained, or
 “ where any action of ejectment shall be brought in
 “ any of the courts at Westminster, great sessions, or su-
 “ perior courts of the counties palatine, by any mort-
 “ gagee, &c. his heirs, executors, administrators, or
 “ assigns, for the recovery of the possession of any mort-
 “ gaged lands, &c. and no suit shall be then depending
 “ in any of his majesty’s courts of equity, for or touch-
 “ ing the foreclosing or redeeming of such mortgaged
 “ premises; if the person, having right to redeem such
 “ mortgaged premises, and who shall appear and be-
 “ come defendant in such action, shall at any time,
 “ pending such action, pay unto such mortgagee, &c.
 “ or, in case of his refusal, shall bring into court, where
 “ such action shall be depending, all the principal mo-
 “ nies and interest due on such mortgage, and also all
 “ such costs as have been expended in any suit at law
 “ or in equity upon such mortgage [such money for
 “ principal, interest, and costs, to be ascertained and
 “ computed by the proper officer of the court], the
 “ monies so paid, or brought into court, shall be deemed
 “ and taken to be in full satisfaction and discharge of
 “ such mortgage; and the court shall and may discharge
 “ such mortgager of and from the same accordingly;
 “ and shall and may, by rule of the same court, com-
 “ pel such mortgagee, at the costs and charges of such
 “ mortgager, to assign, surrender, or reconvey such
 “ mortgaged premises, and such an interest therein as
 “ the mortgagee hath, and deliver up all deeds, &c. in
 “ his custody, relating to the title thereof, to the mort-
 “ gager, who shall have paid or brought such monies
 “ into court, or his executors, &c. or other persons as
 “ he shall appoint.”

The

The second section enacts, "That on bills of foreclosure brought in equity for the payment of the money, or in default thereof for the recovery of the premises, such court of equity, upon application of the defendant having a right to redeem, and upon admission of the plaintiff's right, may, before hearing, make order therein, as if the cause had been brought to a hearing," &c.

Provided, "That this act shall not extend to cases where the right of redemption is controverted or the money due not adjusted, nor to prejudice any subsequent mortgage."

In what cases
this will be allowed.

A judge made an order, pursuant to this act, to stay the mortgagee's proceeding in ejectment, upon bringing principal, interest, and costs, into court; and a rule was made to make the order a rule of court *nisi*. But it afterwards appearing to the court, that notice had been given by the mortgagee to the mortgager, that he insisted upon payment of two bonds, which were a lien upon the estate, the case was adjudged to be out of this act, and the rule *nisi* was discharged. Barnes, 177; *Felton v. Asb.*

Motion to stay proceedings in ejectment, on payment of mortgage-money and costs, pursuant to this act; on shewing cause, the plaintiff produced an affidavit, that the mortgagee had been at great expence in necessary repairs of part of the premises in his possession (the ejectment was brought for the residue), and therefore prayed, that the prothonotary might be directed to make allowance for such repairs. *Per Cur.* The rule must follow the words of the statute. The prothonotary will make just allowances and deductions. Barnes, 176; *Goodright v. Moore.*

Rule on stat. 7 Geo. 2. to shew cause why proceedings should not be stayed, on payment of mortgage-money and costs, was made absolute; the lessors of plaintiff, assignees of the mortgagee, insisted to be paid a bond, and a simple contract debt due to themselves in their own right. *Per Cur.* A bond is no lien in equity, unless where the heir comes to redeem. Barnes, 182; *Bingham dem. Lane and others v. Gregg.*

Motion

Motion to stay proceedings in an action of a bond for performance of covenant in a mortgage deed, and also in an ejectment upon the same mortgage, on paying principal, interest, and costs, to be taxed by the Master, into court, and that defendant who was a prisoner might be discharged. It was objected, that defendant had agreed to convey equity of redemption to plaintiff; but it appearing on affidavit that plaintiff had not tendered to defendant a conveyance to be executed, and that no bill in equity was brought, the court granted the motion. *Skinner v. Stacy*, 1 Will. 80.

Where there are two or more mortgages, the court will not stay proceedings, and compel a redemption of one mortgage only, upon payment of the principal, interest, and costs on that mortgage, without paying the rest. *Roe dem. Kaye v. Soley*, Assignee, Mich. 11 Geo. 3. C. B. 2 Blackf. Rep. 726.

D. Of Proceedings by Corporations.

D.

It used formerly to be the practice, when a corporation was lessor of the plaintiff, for them to execute a power of attorney, authorizing some person to enter and make a lease on the land; because a corporation cannot make an attorney or bailiff but by deed, nor appear, but by making a proper person their attorney by deed. They cannot, therefore, enter and demise upon the land in person as natural persons can, nor substitute an attorney to enter into a rule for their costs, nor will an attachment go against them for disobedience to that rule. Hence formerly they made an actual lease upon the land which was to try the title, and then the attorney proceeded in the common method.

Old way of proceeding.

Why.

But this mode appears now unnecessary; for first, in *Partridge v. Ball*, Lord Ray. 136, which was an ejectment on a demise of a corporation, although the declaration did not state the demise to be by deed, or under the seal of the corporation, yet it was held good: and the case of *Swadley v. Piers*, Cro. Jac. 613, was said not to be law; and the reason given by C. J. Holt was, "for now ejectments are grounded on fiction." It is true, this case was after verdict; but why should it

How rendered unnecessary.

not

not be equally good before verdict? the reason equally applies to both cases.

But secondly, though the declaration state the demise to be by deed, or under seal of the corporation, yet no such lease need be proved at the trial; for *per* Lord Kenyon, "by the common rule and appearance the lease was admitted as stated." *Mayor, &c. of Canterbury, v. Wood*, Sum. Ass. 1794, Run. Eject. 150.

How proceedings may now be.

Perhaps the best way, therefore, is to proceed in the usual way, only stating the demise to be by deed, and under the corporation seal. Defendant cannot avail himself of the fact being otherwise; for if he appears he must enter into the consent rule, and having so done it will operate at the trial as an admission of such a lease.

Of the demise.

If a corporation be aggregate of many, they may set forth the demise in the declaration without mentioning the christian names of those who constitute the corporation; but if the corporation be sole, as if the demise be by a bishop, the name of baptism must be inserted: because, in the first case, the name solely consists in its character, but in the last, in the person; therefore there cannot be a sufficient specification of that person without mentioning his name. *Dyer*, 86.

Ⓒ.

Ⓒ. Of Proceedings in inferior Courts.

Proceedings in inferior courts must be by sealing a lease, &c.

Why.

If the proceedings be in an inferior court the plaintiff must proceed by actually sealing a lease, because inferior courts are not competent to make rules to confess lease, &c. and if they were, they have no power to enforce them. Inferior courts having but a limited authority cannot make new rules to bind persons who do not come in by the proper process of the court, but the superior courts having an unlimited authority in every thing within their jurisdiction may bind any person who consents to their rules. Hence in the former the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector to save expence.

But

But if an ejectment be commenced in an inferior court, and an *habeas corpus* be brought to remove it, and the plaintiff in the ejectment declares against the casual ejector, there may be a rule to confess lease, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

How if afterwards removed by *habeas corpus*.

If an *habeas corpus* be brought to remove a cause in ejectment out of an inferior court, the lands lying within their jurisdiction, and the lessor of the plaintiff seal a lease on the premises, the courts above will grant a *procedendo*, because the title to the land is local, properly within the jurisdiction of the courts below, where, if it proceed regularly, it will not be prohibited; but if the lessor has not sealed a lease on the premises, the courts above will not grant a *procedendo*.

When *procedendo* granted or not.

If the lands lie partly within the cinque ports and partly without, the defendant cannot plead above, the jurisdiction of the cinque ports, for though the land be local yet the demise is *transitory*, and triable any where; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he take proper measures for the purpose, yet if he will proceed in a superior court, as the demise is *transitory*, the defendant cannot stop his proceeding, because those courts have competent jurisdiction. 1 Keb. 690. 795. 2 Keb. 69. Run. Eject. 151, 152.

If lands lie part within and part without inferior jurisdiction where action may be.

f. Proceedings by Infants.

f.

If the lessor of the plaintiff is an infant, after the plea is filed you may have a summons, or move the court for a rule "to shew cause why further proceedings should not be staid until some person, on behalf of the lessor of the plaintiff, gives security for payment of the defendant's costs, in case of a nonsuit or a verdict for defendant, the lessor of the plaintiff being an infant, Bar. 183.;" and an order or rule will be granted though there is a real plaintiff named.

How security for costs may be had if infant plaintiff.

You petition in the same manner to appoint a guardian as under title of proceeding by and against infants, ante ch. 15, sec. 5.; and the guardian enters into common

Of the petition, &c.

mon rule, and employs an attorney for that purpose. Imp. K. B. 560. C. B. 665.

How infants liable to the costs.

By this practice which first began in K. B. and afterwards was adopted in C. B., if an infant deliver a declaration to the defendant, some friend or guardian must be set up as plaintiff, to be responsible for the costs. Bar. 283. Str. 694. 932. 1 Will. 130. But if such person die insolvent, the infant himself must answer for the costs.

Previous however to any motion in court, enquiry should be made whether there be a real and substantial plaintiff; for perhaps the guardian may undertake to pay the costs, and there may be no reason for court to interpose. Cowp. 128. Run. Eject. 188. (Edit. 1795.)

Whether the demise should be stated in declaration, to be by deed and reserving rent. See *ante* sect. 1, §. See also this section D.

SECTION IV.

Of the Action for Mesne Profits.

Origin and meaning of this action.

In the first Section of this Chapter, it has been shewn, that before the time of Hen. 7. plaintiffs in ejectment did not recover the term; but until about that time the *mesne* profits accruing to the ejector, were the measure of the damages given the ejected. So that by the old law and practice in ejectment, the plaintiff recovered nothing but damages, no term was recovered; but when it became established that the term should be recovered, the ejectment was put into the form of a real action; the proceeding was *in rem*, and the thing itself—the *term only* then was recovered, and nominal damages, but not the *mesne* profits; whereupon a mode of recovering the *mesne* profits [after the ejectment had been tried, and the plaintiff had recovered possession] in an action of trespass was introduced, and grafted upon the present fiction in ejectment; and the action

action of trespass for the *mesne* profits is put in the place of the ejectment at common law, which was a true, and not a fictitious action, and nothing more than an action of trespass. Vide *Goodtitle v. Toombs*, 3 Will. 120. *Aslin v. Parker*, 2 Burr. 665.

These *mesne* profits are the value of the premises during the time that the lessor of the plaintiff has been illegally kept out of possession of his estate, by the defendant. What the *mesne* profits are.

He is entitled to them not merely from the time of the demise laid in the declaration of ejectment, but from the time that his title accrued. Bull. Ni. Pri. 87. From what time plaintiff entitled to them.

For although he may not have been in actual possession all that time, no real entry having in the first instance been made by him; yet such entry when made had relation to the time when the title accrued. *Stonyhaugh v. Cousins*, 2 Bar. 367. Espin. 494.

But as this is a mere action of trespass, he can never recover more than six years, if defendant pleads the statute of limitations. Bull. Ni. Pri. 88. How barred by statute of limitations.

There is however a difference in the nature of the proof, according to the time for which the plaintiff goes for the *mesne* profits. If he goes only for the time from the demise laid, the record of the recovery in ejectment is conclusive evidence of the plaintiff's title; so that he need only produce the judgment in ejectment and writ of possession executed, and he will be entitled to recover; but if he goes for time before the demise laid in the declaration, the defendant is at liberty to controvert his title; so against a precedent occupier, the record is no evidence, and therefore against him the plaintiff must shew and prove a title. Bull. Ni. Pri. 87. *Aslin v. Parker*, 2 Burr. 667. 1 Sid. 239. Str. 960. Of the proofs in this action.

For this reason it is the best way to lay the demise in the declaration, as near to the time when plaintiff's title accrued, as can be done with safety.

Neither as to the length of time the tenant has occupied, nor as to the value, is the judgment in ejectment any proof; therefore they must be proved in this action.

Jury not confined to the true value.

Nor is the jury confined to give merely the value of the *mesne* profits; they may take into consideration the plaintiff's trouble, &c. and give what damages they think proper. 3 Will. 108.

The judgment in ejectment by default is of the same effect in this case, as if it had been after verdict; the only difference seems to be in the proof, that in the former case plaintiff should produce not only the judgment but the writ of possession executed; whereas in the latter the judgment only is sufficient. 2 Burr. 666. 3 Will. 119. Str. 960.

In whose name this action may be brought.

This action may be brought in the name either of the nominal plaintiff or his lessor, against the tenants in possession, whether he be made a party to the ejectment, or suffers judgment by default. *Aslin v. Parker*, Burr. 667.

How if by the nominal plaintiff.

But if brought in the name of the former, the court on application will stay the proceedings till security is given for the costs. *Pike v. Corbin*, Say. 78. Nor can plaintiff go for the *mesne* profits beyond the time of the demise laid in declaration.

Defendant may be held to bail.

Defendant may be held to bail in this action. See vol. I. p. 43.

Cannot pay money into court.

The defendant cannot pay money into court in this action. *Holdfast v. Morris*, 2 Will. 115.

Parcels must be mentioned.

In an action for *mesne* profits the parcels must be mentioned, or plaintiff may plead the common bar.

How if brought by tenant in common.

If one tenant in common recovers in ejectment against another, he may have trespass for the *mesne* profits. 3 Will. 118.

Costs of ejectment recoverable by it.

After judgment by default, the costs in the ejectment are recoverable, and usually declared for, as damages in the action for *mesne* profits. 1 D. & E. 547. 3 Will. 121.

After verdict, the costs are taxed and enforced by attachment, as *ante*.

But where defendant became bankrupt after the judgment in ejectment by default; and before the action brought for *mesne* profits, and having suffered judgment by default in the latter action also, the jury on the writ of enquiry did not include the costs of the ejectment; Court on motion refused to set aside inquisition, saying, plaintiff might have had another remedy; the costs were a liquidated debt, and he might have proved them under the commission. *Gulliver v. Drinkwater*, 2 D. & E. 261.

How if jury has not included them, and defendant is a bankrupt.

Bankruptcy is no bar to an action for *mesne* profits; as it is a demand for a tort. *Goodtitle v. North*, Doug. 584.

Bankruptcy no bar to this action.

This action may be brought pending a writ of error in ejectment, and plaintiff may proceed to ascertain his damages, and to sign his judgment; but the court will stay execution till the writ of error be determined. *Harris v. Allen*, Cook. 46.

It may be brought pending a writ of error.

If in ejectment there is a verdict for plaintiff, and defendant bring error, and enters into recognizance to pay costs in case of *nonsuit*, &c. pursuant to the statute of Charles the Second; and he be nonsuited, &c. defendant in error need not bring a *scire facias*, or *debt* on the recognizance, but may sue out an *elegit*, or *writ of enquiry*, to recover the *mesne profits* since the first judgment in ejectment. *Short v. Heath*, Mich. 12 Geo. 2. 1 Cromp. 223.

How if defendant bring error, and is nonsuited.

SECTION V.

General Observations on Proceedings in Ejectment.

- A. Of amending Proceedings in Ejectment.
- B. Of consolidating Declarations.
- C. Of bringing a new or second Ejectment, and staying Proceedings till Costs of first are paid.
- D. Of Security for Costs in other Cases in Ejectment.
- E. Of quieting Plaintiff in his Possession after Judgment and Execution in Ejectment.

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A. Of

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A. Of amending Proceedings.

Of amending
the declarations.

It is a rule in both courts that no declaration in ejectment can be amended before appearance, and that after appearance it can only be amended in form, not in matter of substance. *Roe dem. Stevenson v. Doe*, Bar. 186.

But amendments are now carried further than formerly, and that which used to be deemed substance, (as the demise, &c.) is now held matter of form and amendable.

Thus where the ejectment was to avoid a fine, and the demise laid *before* plaintiff had made the entry, instead of *after*, it was on motion ordered to be amended; and, *per* Lord Mansfield, the demise is mere matter of form, it does not exist. *Hardham v. Pilkington*, 4 Burr. 2447.

So the term was ordered to be enlarged, after it had expired twelve years, though the cause was at issue, and special jury struck, and the parties gone down to trial, before the mistake was discovered. *Roe dem. Lee v. Ellis*, 2 Blac. Rep. 940. See also *Vicars v. Haydon*, Cowp. 841.

So, an amendment was made in the parcels, and in the name of plaintiff for the defendant. *Williams v. Barclay*, B. R. 16.

Of amending the
postea.

The *postea* may be amended by the judges notes at any time, even after final judgment and writ of error brought. *Church v. Perkins*, 3 D. & E. 749.

Though it used to be held that such amendment could not be made after a term had elapsed. Doug. 709.

Of amending
the verdict.

When the verdict may be amended by the judges notes, see vol. I. p. 499.

After verdict, if the objection be founded on the mere mistake of the clerk, or a trifling nicety, there is no need of any actual amendment, the court will overlook

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look the objection. *Small dem. Baker v. Cole*, 2 Burr. 1152. 4 Burr. 2447.

15. On consolidating Declarations.

On motion in C. B. to consolidate *sixteen ejectments* in one, after sixteen several issues joined, and though it was urged for the plaintiff, that the issues were delivered and paid for a long time ago, the court held, that it was necessary for the defendants to pay for the issues to prevent judgment, and ordered the ejectments to be consolidated.

N. B. Each declaration contained a large number of messuages, and they were word for word the same. Had each been for one messuage only, the plaintiff might have tried them separately. *Barnes*, 176, *Grimstone v. Burgers*.

And this distinction (though I think very unsatisfactory) seems at that time to have been observed; for where ten declarations on the same demise were delivered for ten houses in Steyning in Suffex, in the occupation of *ten persons*; and on motion to consolidate them, and put them all in one issue, upon suggestion that the title was the same in all, the court refused it; for they said the lessor might have sued them at ten different times, and it would be obliging him to go on against all, when perhaps he might be ready in some of them only. *Stra*, 1149, *Smith v. Crabb*.

But the courts at this time will not endure such a multiplicity of suits.

In the case of *Doe dem. Pultney and others v. Freeman and others*, Trin. 1790., on a rule to shew cause why the proceedings in all the causes (which were 37 in number brought against the several inhabitants of the houses in Sackville-street) should not be stayed and abide the event of a special verdict, in *Doe dem. Pultney v. Caven*;—Lord Kenyon said, it was a scandalous proceeding, they all depended precisely on the same title, and ought all to be tried by the same record. Rule absolute. See also *Cecil v. Briggs*, 2 D. & E. 639.

- C. Of bringing a new or second Ejectment, and staying Proceedings till Costs of first are paid.

It may be remembered that a judgment in ejectment is a mere recovery of the possession without prejudice to the right: it is not final between the parties so as to protect either the defendant or plaintiff (if he succeeds) from any further suit.

Same plaintiff may bring fresh ejectment against same defendant, and so vice versa.

The same plaintiff (if he be nonsuited, or have a verdict against him) may bring another ejectment against the same defendant, or if he succeeds in the action and gets possession, he is still liable to an ejectment from the defendant in the former action.

This in one respect may be deemed an advantage, because the parties are not concluded by one trial, in case the real merits (from accident, partiality, want of evidence, which might afterwards be supplied, or the like) happened not to have been fairly tried between them; but in another respect, much mischief may result from it. The spirit of litigation is thereby kept alive, and the successful party may be constantly harassed by the attacks of his opponent.

No remedy in equity.

It has sometimes indeed been attempted in Chancery, after three or four ejectments, by a *bill of peace* to establish the prevailing party's title, yet it hath always been denied, for every *termor* may have an ejectment, and every ejectment supposes a new demise, and the *costs* in ejectment are a recompence for the trouble and expence to which the possessor is put. But where the suit begins in Chancery for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, the court hath ordered a *perpetual injunction* against the defendant, because there the suit is first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent, and inequitable against the possession, it is within the compass of the court to relieve against it.

As the costs of the ejectment are deemed the recompence as above stated (though in truth but a poor one), the courts will not suffer either the plaintiff to bring a new ejectment, or the defendant to bring the ejectment against the successful plaintiff, until the costs of the former action are paid.

Proceedings stayed till costs of first action paid.

The remedy to enforce the payment of costs after verdict is by attachment; and as one court cannot strictly take cognizance of the rules of another, it used to be held that a new ejectment brought in B. R. the former having been in C. B. the court of K. B. could not stay proceedings therein, though the costs of the former action in C. B. were not paid. But this is no longer a subterfuge.

Formerly this could not be done if second action brought in another court.

The courts now consider a former ejectment in another court, as one in the same court, and will stay proceedings in a second, till the costs of the former are paid. Bar. 133, *Holdfast dem. Hatterley v. Jackson. Doe dem. Chadwick v. Law*, 2 Blac. 1158. *Lord Conynghy's Case*, Str. 548.

But now there is no difference.

So, though in such former ejectment the lessor of plaintiff never entered into the consent rule. *Smith v. Barnardiston*, 2 Blac. 904.

To what cases it extends.

So, when an ejectment was brought by a fraudulent assignee of an insolvent debtor, the former lessor of plaintiff. *Doe dem. Chambers v. Law*, 2 Blac. 1180.

So, proceeding stayed in error and a second ejectment, plaintiff not being able to shew that the writ of error was brought with any other view than to delay payment of costs. Str. 554, *Grumble v. Bodilly*.

But where the lessor of plaintiff has been taken in custody upon an attachment for costs, which is in the nature of a *ca. sa.* there is no reason to grant the rule to stay proceedings in another action brought by the same lessor on the same demise. *Benn dem. Mortimer v. Denn*, Bar. 180.

Not where plaintiff is in custody or attachment for the costs.

But where before trial, a mistake is discovered, so as to render it necessary to serve a new ejectment, the

How where action is abandoned for a mis-

take therein,
and a new one
brought.

the court will not stay proceedings till costs of first are paid, unless the party has been vexatious, or great expence incurred; but if the lessor of plaintiff be not known, court will order notice to be given where they may be found. *Short v. King*, Str. 681. *Thrustout and Troublefome*, Str. 1099. *Brittain v. Grenville*, Ib. 1121. So, if he abandons his suit in one court and brings a new action in another. *Selby v. Aston*, 1 D. & E. 491.

Proceedings in a second ejectment were stayed till the special verdict in the former was determined. Str. 1105.

What defendant
must do before
he can bring his
ejectment
against plaintiff.

When the plaintiff succeeds in an ejectment, the defendant cannot bring in a new ejectment against him, until he has given up possession to the plaintiff, or the tenants in possession have attorned to him. *Fennell v. Grosvenor*, Salk. 258.

And I conceive, (upon the principle of the above cases,) until he also has paid the costs of the former ejectment. See *Running. Eject.* 420. (Edit. 1795.)

When plaintiff
may discontinue
after special
verdict.

The court will not give plaintiff leave to discontinue after a special verdict has been had, in order to adduce fresh proof in contradiction to the verdict. *Roe dem. Fray v. Fray*, 2 Blac. 815.

D. Of Security for Costs in other Cases in Ejectment.

Three instances
only where
court orders se-
curity for costs.

There are only three instances in which the court will interfere on behalf of the defendant, to oblige plaintiff to give security for costs. The first is when an infant sues, then the court will oblige the *prochein ami*, or guardian or attorney, to give such security. 2dly, Where the plaintiff resides abroad: even residing in Ireland held sufficient. 2 Burr. 1177. And 3dly, where there has been a former ejectment, as treated of *ante*, C. the court there staying proceedings till costs are paid. *Selby v. Aston*, 1 D. & E. 491. 2 D. & E. 511.

c. Of quieting Plaintiff and relieving him when his Possession is disturbed after Execution executed.

The writ of execution in ejectment is only returnable at the instance and election of the plaintiff, for the court will not direct the writ to be returned at the instance of the defendant; which seems to be left to the choice of the plaintiff, that he may take what is most for his advantage, in order to have the full benefit of his judgment: and the way to that is, to suffer him to renew the execution at his pleasure, till a new execution be had; but he cannot renew execution, after he has once procured the writ of possession to be returned and filed; because it then appears on record, that the plaintiff hath had the benefit of his suit, and then to award a new execution would be *actum agere*, and consequently superfluous; and therefore the court will never oblige the sheriff to make a return, but at the plaintiff's desire. Roll. Abr. 386. 2 Keb. 245. Roll. Rep. 353. Ld. Raym. 352. 346. 482. 718. 725. 1072. Carth. 496. Salk. 260. pl. 1. 5 Mod. 443.

If the writ is once returned, though not filed, it seems, no new *habere facias* shall issue, because when the return is made it becomes a record, which the court then is entitled to. 2 Brown, 216.

When the writ is not returned, in order for a new writ, there must be a suggestion, that *vicecomes non misit breve*; but this new writ cannot issue, till the return of the first writ is out; because till that return is past, *non constat* to the court, but that the sheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment, and so no new writ is necessary. Palm. 289.

The writ is not executed, nor the execution complete, till the sheriff and his officers are gone, and the plaintiff left in quiet possession. If the officer is disturbed in the execution of the writ, on affidavit thereof, the court will grant an attachment against the party, whether the defendant or a stranger, because the writ is the process of the court, and the disturbance is a contempt

contempt of its authority. 6 Mod. 27, *Kinsdale v. Mann*.

But after possession once given, and a disturbance thereof, the law makes a difference where the plaintiff is turned out by the defendant himself, and where by a stranger: If by the defendant and the writ not returned, the plaintiff may have a new *habere facias* or an attachment, because the defendant himself shall never keep that possession, which the plaintiff is entitled to, and has recovered by due course of law; but if he is turned out by a stranger after execution executed, the plaintiff is put to his new action upon an indictment of *forcible entry*, where the force will be punished, because the title was never tried between the plaintiff and a stranger, and the stranger may claim the land by title paramount to the plaintiff, or he may come in under him, and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession which he may have a right to; and if the law were otherwise, a plaintiff, by virtue of an *habere facias*, might turn out his own tenant, who came in after execution executed; whereas the possession was given him against the defendant only, and not against others not party to the suit. *Ratcliffe v. Tate*, Keb. 479. 1 Salk. 321, *Perkins v. Woolaston*.

In the case of *Fortune and Johnson*, on motion for an attachment against Johnson, for ejecting the plaintiff, who had been put into possession by an *habere facias*, the court made no rule, because it appeared that Johnson claimed under an elder judgment, and it was title against title, and therefore left them to take their course at law. Style, 318.

The plaintiff had judgment, but, by agreement afterwards, the defendant was to hold for the residue of his term, and accordingly held for some time; then the plaintiff took out an *habere facias*, and executed it: upon which the defendant moved for restitution on the agreement, which the court refused, and left him to his action on the agreement, for the judgment was ruled absolutely. But if the judgment had been with a *cesset executio* till such a time, then if the plaintiff takes out execution within the time, the defendant shall have restitution.

stitution, because the judgment was entered with the limitation. Style, 408. Law of Eject. 113, *Ward v. Markham*.

But *quære*, how does this appear to the court, since seems a *cesset executio* is never entered on the roll? The difference seems to be between a judgment by confession, and on verdict, where the former is given with a *cesset executio*; and there, if the execution is taken contrary to the agreement, the court will set it aside, and punish the attorney: but where judgment is given on verdict, the verdict is the foot and ground of the judgment, and the court will not take notice of agreements between the parties, but leave them to their remedy. 1 Sid. 379.

This used to be the distinction, but the courts will now relieve in a summary way, upon such agreements. See ante, ch. 14. sec. 2 and 3.

II. Of Penal Actions.

By stat. 21 Jac. 1. c. 4. it is enacted, that all offences hereafter to be committed against any penal statute for which any common informer or promoter may lawfully ground any popular action, bill, plaint, suit, or information before justices of assize, of *nisi prius*, of oyer and terminer, or justices of the peace, shall be commenced, sued, and prosecuted, &c. before them, and not at the courts at Westminster; and by the same statute an affidavit must be filed, that the offence was committed in the county where the action is brought, and within a year before the bringing of it.

In what courts to be brought.

Stat. 21 Jac. 1.

Of the affidavit required by that statute.

Upon this statute objections have been made in one or two late cases, to the action being brought in the superior courts, and also to the want of such affidavit. But it is now determined that the above statute only extends to such cases, where, before that time, the penalty might have been recovered in the inferior as well as the superior courts, by action, bill, plaint, suit, or information. So that, wherever by any act then in force, the informer might have sued by action, bill, plaint, or information in the inferior courts as well as in

Construction of the above statute.

in

in the courts at Westminster, he is confined to sue in the former; but as that statute gives no new jurisdiction to the inferior courts, the party may still sue in the courts at Westminster for all those penalties which could not, before the passing of that statute, have been recovered in the inferior ones. *Shipman v. Herbert*, 4 D. & E. 116.

When an offence is created by statute under a penalty, the penalty may be sued for in the superior courts at Westminster, unless ousted of its jurisdiction by express words or by necessary implication. *Cotes v. Knight*, 3 D. & E. 444.

So, as to the affidavit ordered by the same statute, it only applies to cases where the party sues before the justices, &c. according to that statute. There is no occasion for it in an action in the courts above; notwithstanding the case of *White v. Root*, 2 D. and E. 274, which has since been held not law, in *Leigh v. Kemp*, 3 D. & E. 364.

When penal actions to be brought.

By 31 Eliz. c. 3. actions on penal statutes must be brought within a year from the time of committing the offence; but this does not extend to an action given by statute to the party grieved.

Proceedings therein.

In what cases the defendant may be held to bail in penal or popular actions, see vol. I. ch. 2. A. 5. and also of the affidavit to hold to bail on the lottery act, see vol. I. ch. 4. sec. 1. A. 2, 3.

The proceedings in penal or popular actions from the declaration to judgment, are the same as in common cases, for which see under the different heads.

Of the plea of not guilty.

If not guilty is pleaded to an action of debt on a penal statute, it is not such a nullity as warrants judgment to be signed for want of a plea; indeed it is doubtful whether it is not a good plea. *Coppin v. Carter*, 1 D. & E. 462.

Of pleading double.

The defendant in a penal action cannot plead double; the statute 4 Ann. c. 16. peremptorily forbidding it. *Heyrick v. Foster*, 4 D. & E. 701.

If there is reason to think that the action on a penal statute is carried on merely for the issue money, it will be ordered to be paid into court to abide the event.

In penal actions no costs are allowed; but if the action be brought by the party grieved he is entitled to costs; wherever therefore a statute gives accumulative damages to the party grieved, it is not a penal action. *Woodgate v. Knatchbull*, 2 D. & E. 154. Of costs.

If the jury find a verdict for plaintiff with one penalty generally, and plaintiff apply it to one count, he cannot afterwards apply it to another, though the former is bad in law, and though the evidence would have warranted the verdict on any other. *Holloway v. Bennet*, 3 D. & E. 448.

The courts never grant a new trial in penal actions, except upon the ground of misdirection of the judge, *Wilson v. Rastal*, 4 D. & E. 753; in which case they will. *Calcraft v. Gibbs*, 5 D. & E. 19. New trial.

In amendments at common law there is no distinction between penal and civil actions. So that whilst the proceedings are in paper, the courts will allow the one as well as the other. But as it is a discretionary power in the court, they will exercise it with proper caution. If therefore upon such an application it appears that a great length of time has elapsed, (as four years since the action brought,) so that if a new action were commenced, defendant might plead the statute of limitations, the court will not permit plaintiff to amend. *Goff v. Popplewell*, 2 D. & E. 707. *Steel v. Sowerby*, 6 D. & E. 171. Amending proceedings.

No person can be prosecuted twice for the same offence. It used formerly therefore to be a common practice, when any one had offended against a statute and was apprehensive of an action, for him to procure some friend to commence a suit against him, in order to forestall others, and then to suffer judgment secretly and plead such judgment recovered; but to prevent this practice and fraud upon the king, who was thereby often deprived of his moiety of the penalty, the statute 4 Hen. 7. c. 20. enacts, that no recovery otherwise than Of friendly prosecutions.

than by verdict, obtained by collusion, in an action popular, shall be a bar to any other action prosecuted *bonâ fide*; so that a judgment or verdict must be obtained to render such amicable suit effectual.

When a defendant is conscious of being guilty of the offence for which the action is brought against him, it is often the most prudent way to compound upon the best terms he can.

Of compounding Penal Actions.

Of compound-
ing.

In common actions the parties may compromise upon such terms as they think fit; but in penal and *qui tam* actions they can only compound by leave of the court.

Stat. 18 Eliz.

For by stat. 18 Eliz. c. 5. s. 3. no informer shall compound or agree with persons that shall offend against any penal statute for an offence committed, but after answer made in court unto the information or suit; nor after answer but by order of the court, on pain upon conviction of standing on the pillory, being disabled to sue on any popular statute, and forfeiting 10*l*.

Exception
therein.

By sec. 6. The act is not to restrain any certain person, body politic or corporate to whom or to whose use any forfeiture, penalty, or suit is or shall be specially limited or granted by virtue of any statute, and not generally to any person that will sue.

To whom it ex-
tends.

So that the statute only extends to suits by common informers, not to those by a party grieved. 2 Haw. 279.

Discretionary
power in the
court.

It is in the discretion of the court to give leave to compound, which they will exercise according to the nature and exigency of the case.

How exercised.

It was refused in an action for making and selling gold rings of less fineness than statute direct. *Hornell v. Morris*, 1 Willf. 79.

When leave
granted.

Granted upon the statute of gaming, on affidavit that plaintiff was a bankrupt, and that the assignees were satisfied with respect to defendant. 1 Willf. 130.

So, on an affidavit of defendant's poverty. *Bradshaw v. Mottram*, Str. 167.

But where the sum agreed to be paid is so small as to appear manifestly collusive, court will refuse. *Wood v. Cassin*, Blac. 1157. When not.

And this motion may be made and leave granted after verdict, *Mayhan v. Walker*, 5 D. & E. 98.; or when defendant is in execution. Str. 167. Granted after verdict.

If a defendant in a penal action obtain a rule with plaintiff's consent to stay proceedings on paying a sum agreed upon between him and plaintiff, it is an absolute undertaking to pay that sum, (not optional to pay or to proceed in the action,) and for the non-payment of it, the court will grant an attachment. *King qui tam v. Clifton*, 5 D. & E. 257. Effect of rule to compound when obtained.

In all cases of compounding, it must be with consent of both parties. Must be by consent.

It is done by motion in court, grounded upon an affidavit of one of the parties, that an action is brought upon such an act, that declaration contains penalties to such an amount, that since defendant has pleaded *nil debet*, and that plaintiff and defendant have agreed to compound the same for *ten pounds*, and that no more is given or taken, nor is it compounded in any other way than by leave of the court. How to proceed.

Counsel must move it, and another brief must be given to another counsel to consent. The king's half of the penalty must be paid into the hands of the master of the Crown-office, before the rule is drawn up.

In C. B. the king's share must be paid to prothonotary, and his receipt obtained before the motion to compound is made. *Burr.* 1929. Blac. 1157.

Draw up rule with clerk of rules in K. B. and secondary in C. B. and serve copy on the attorney of the other side.

III. Of Replevin.

SEC. 1. *Of the Nature of the Action, and by whom, and in what Courts to be brought.*

SEC. 2. *Of the Proceedings therein when the Distress is not for Rent.*

SEC. 3. *Of the Proceedings when the Distress is for Rent.*

SEC. 4. *Of the Remedy in both Cases when the Pledges are insufficient.*

SEC. 5. *Of the Non Pros, Nonsuit, Verdict, and Judgment, in both Cases.*

SEC. 1. *Of the Nature of the Action of Replevin, and by whom, and in what Court to be brought.*

Replevin what.

Replevin is a remedy grounded upon a distress; for goods are only repleviable when they have been taken by way of distress.

It is a re-deliverance of the goods or cattle distrained to the first possessor, on security given by him to try the right, and again to return the things distrained, if judgment be eventually given against him. Co. Litt. 145.

Of the common law proceedings altered by statute.

The old common law way of proceeding was by writ of replevin; but as much delay and inconvenience was occasioned thereby, the statute of Maribridge, 52 Hen. 3. empowers the sheriff of the county immediately, upon complaint made to him, to replevy the goods without any such writ.

Modern practice.

The usual practice therefore now is, to proceed by plaint in the county court; and it is not necessary for the plaintiff to stay till the county court is held, before he makes plaint, provided it be afterwards entered there; and upon plaint made to the sheriff of goods or cattle distrained, he by parol or precept may, by his bailiff

bailiff, replevy them. 2 Inst. 139., and this, though they be above the value of 40 s.

"For the more speedy delivery of cattle distrained, the sheriff (by statute 1 & 2 P. & M. c. 12.) must appoint four deputies at least in his bailiwick, dwelling not above twelve miles one from the other, to make replevins, who have authority in his name so to do."

Of statute 1 P. & M.

The action of *replevin* is of two sorts; 1. in the *detinet*; 2. in the *detinuit*; and may be brought in any case where a man has his goods and cattle taken from him by another, by way of *distress*.

Two sorts of action.

Where the party has had his goods re-delivered to him by the sheriff upon a writ of replevin, or upon a writ levied before him, the action is in the *detinuit*; wherefore he detained the goods, &c. but where the sheriff has not made such replevin, but the distrainer still keeps possession, the action is in the *detinet*; wherefore he detains the goods, &c. However, of late years, no action has been brought in the *detinet*, though there is much curious learning in the old books concerning it,

In the *detinet* and *detinuit*.

The advantage the plaintiff has in bringing an action of replevin in the *detinet*, instead of an action of trespass *de bonis assortatis*, is, that he can oblige the defendant to re-deliver the goods to him immediately, in case upon making his avowry they appear to be repleviable; but as he may more speedily have them delivered immediately after they are distrained, by application to the sheriff, the action in the *detinet* has fallen into disuse, and is never brought, unless the distrainer has esloined the goods, so that the sheriff cannot get at them to make replevin; and then it may be brought in the *detinet*: whereupon, after avowry made, the plaintiff may pray that the defendant give deliverance; or he may, upon the return of *elongavit* to the *pluries writ of replevin*, have a writ to the sheriff, commanding him to take other beasts, &c. of the defendants in *withernam*; but then, if the defendant, before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non recipit*, it shall stay the *withernam*; for the defendant shall not be concluded by the return of the *elongavit*, because

The former fallen into disuse.

Why.

because the sheriff can make no other return, where he cannot find the thing to be replevied.

Of the withernam.

The word *withernam* is a term which signifies a second or reciprocal distress, in lieu of the first, which was esloined. The writ of *capias in withernam*, is a writ therefore to the sheriff, commanding him to take other goods, &c. of the distrainers, in lieu of the distresses formerly taken and esloined or withheld from the owner. So that here is now distress against distress, the one being taken to answer the other by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer. For which reason, goods taken in *withernam* cannot be replevied till the original distress is forthcoming. *Ld. Raym. 475.*

How if property is claimed in the goods.

Of the writ de proprietate probandi.

If the person taking the goods claims property in them before the sheriff, he cannot make replevin of them: but then the plaintiff may sue out a writ de proprietate probanda, upon which the sheriff must have an inquest of office; and if, upon such inquisition, the property is found in the plaintiff, the sheriff shall make replevin; otherwise not. But though the property is not found in the plaintiff, he is not concluded, for he may still have his action of replevin in the *detinet*, or of trespass. But if in an action of replevin the defendant plead property, and it be found for him, the plaintiff is thereby concluded.

Who may bring replevin.

Therefore, he that brings replevin must have an absolute, or at least a special, property in the thing distrained; so that several men cannot join in a replevin, unless they be joint-tenants, or tenants in common. *Co. Lit. 145.*

Executors.

Executors may have a replevin of a taking *in vita testatoris*; for this affirms the property to remain. *Bro. Rep. 59. Sid. 82.*

Feme sole.

So if the cattle or goods of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin; but if they join, and there be a verdict for them, judgment will not be arrested, because the court will presume them jointly interested (as they may, if a distress be taken of goods, of which a man and a woman were

were joint-tenants, and afterwards intermarry): the avowry admitting the property to be in the manner it is laid. Bull. Ni. Pri. 53.

When an act of parliament orders a distress and sale of goods, this is in nature of an execution, and *replevin* does not lie. No replevin for distress under a statute.

The usual place and method of commencing an action of replevin is in the *county court* by *plaint* (this being the most expeditious mode of getting back the goods distrained as above-mentioned). Where and how to be brought.

But it may be brought either in the K. B. or C. B. by writ returnable therein. So, by special custom in an hundred court, or other court of record that may hold plea thereof. Sal. 580. 2 Inst. 139. 3 Mod. 56.

Or in the county court by *writ*, which was formerly the only way the sheriff could replevy, till the statute of Marlbridge gave the *plaint*. Ld. Raym. 219.

But though the sheriff may grant *replevins* by *plaint*, and proceed thereon in the county court, yet if any thing touching the *freehold* come in question, or ancient *tenement* be pleaded, the sheriff can proceed no further: nor can any such proceedings be carried on in the hundred court, court baron, or any other court claiming a jurisdiction herein by prescription. 4 Hen. 6. 30. Hen. 7. 6. Co. Lit. 145. How if freehold comes in question;

So when the king is party, or the taking is in right of the crown, the sheriff is to surcease. Bro. Rep. pl. 3. or the king is party.
crown, 33.

Although the proceeding by writ in the county court is very unusual, yet it may not be improper to give a brief account of it. Of the proceedings by writ in county court.

If the replevin is by writ there, the writ issues out of chancery, and is in the nature of a *justicies*. 2 Inst. 240.

And if the sheriff does not return it, or does nothing upon it, the plaintiff may have an *alias*, in which is inserted usually this clause, that he make replevin, *vel causam*

causam nobis significes. F.N.B. 68. c. And after that a *pluries*.

If the sheriff makes replevin, he need not return the writ; but if he does not, he ought to return the cause. 2 H. 7. 5. b.

And if he does not, an attachment lies against him to the coroners, commanding them to attach the sheriff for his contempt, and in the interim make replevin. Reg. 81.

To any of these writs, the sheriff cannot return a *mandavi ballivo*, &c. For by Westm. 1. 17. the sheriff ought immediately to enter the franchise, and make deliverance. F.N.B. 58. f.

If he does not replevy, and makes any other return, the plaintiff shall have a *capias in withernam*; and after that, an *alias*, and a *pluries capias in withernam*.

Replevin being a remedy grounded upon a distress, the proceedings therein differ according to the nature of the distress. By particular acts of parliament, various regulations are made, respecting distresses for rent and the action of replevin thereon, which do not apply to other cases. In the consideration therefore of this subject, it will be rendered more clear and intelligible by shewing, 1st, the proceedings in replevin, when the distress is not for rent; and 2dly, when the distress is for rent.

SECTION II.

Of the Proceedings in Replevin when the Distress is not for Rent.

A. How and when to make Replevin, and of the Pledges.

B. How if Cattle be eloigned, and cannot be replevied, and of the Power of Sheriff in making Replevin.

C. Of removing the Suit; and herein of the *Re. fa. lo.*

D. Of the subsequent Proceedings, and compelling the adverse Party to proceed.

E. Of the Writs of second Deliverance and Withernam.

F. Of the Declaration and Pleadings in the Court above.

G. How and when to make Replevin, and of the Pledges.

3.

At common law, in all cases, a distress when made was holden merely as a *pledge*; it could not be sold nor disposed of. So it is now, except where the distress is for rent. (See next sect. 3.) Whenever the person whose goods are taken as a distress, wishes to have them immediately again, *i. e.* to replevy them, (*replegiare* to get the *pledge* back again,) he may, upon application to the sheriff, have them restored. But he must first give security that he will *prosecute* his suit, (*i. e.* his action of replevin in order to try the legality of the distress,) and also that he will redeliver the cattle or goods distrained, if judgment be against him.

Of the nature of a distress at common law.

What to be done on making replevin.

These pledges for prosecution of the suit, and for the return (*pro retorno habendo*), are ordered to be taken by stat. Westm. 2. c. 2. which enacts, "That sheriffs or bailiffs from thenceforth shall not only receive of the plaintiff, pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts; and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the bailiff be not able to restore, his superior shall restore."

Of the pledges ordered by statute Westminster 2.

Upon plaint being made and pledges found, (as above mentioned,) which is done at the sheriff's office, the sheriff or one of his deputies, by the stat. 1 & 2 P. M. (see *ante*, sect. 1.) is to make replevin of the goods or cattle distrained, which is done by granting a warrant to the following effect:

How the sheriff makes replevin.

R 3

" Bucks,

Of the warrant
for that purpose.

"Bucks, to wit. A. B. esq. sheriff of the county afore-
said: To the bailiff of the hundred of Desborough, in
the said county; and also to John Thomas, and William
Jones, my bailiffs, and to every of them, greeting.
For as much as C. D. hath found me sufficient se-
curity as well to prosecute a suit against E. F. and
G. H. for taking and unjustly detaining of his cattle,
goods, and chattels, to wit, *one mare and four colts*,
which the said E. F. and G. H. have taken and un-
justly detained, as is alleged; as also for return
thereof, if a return thereof should be adjudged: there-
fore I command you, and every of you, jointly and
severally, that on the behalf of our lord the king, you
replevy, and cause to be delivered to the aforesaid
C. D. his cattle, goods, and chattels afore said; and
that the aforesaid E. F. and G. H. give, or cause to
be given, sufficient pledges, so that they may be and
appear at the next county court to be holden at
Aylesbury, in and for the county of Bucks afore said
to answer the aforesaid C. D. in a plea of taking, and
unjustly detaining of his cattle, goods, and chattels
afore said; and in what manner you shall execute the
precept certify to me at the said next county court,
to be held at the time and place afore said, under the
peril incumbent. Given under the seal of my office
this day in the thirty-sixth year
of the reign of our sovereign lord George the Third
king of Great Britain, &c. and in the year of our
lord 1795."

By John Dix

One of the replevinors appointed
by the said sheriff for the said county
of Bucks.

Of the time of
making reple-
vin.

There is no particular time when the replevin may
be made, as the distress cannot be disposed of, but may
only be kept as a pledge.

B.

B. How if the Cattle or Goods are eloiined and
cannot be replevied, and of the Power of
Sheriff in making Replevin.

If cattle, &c.
eloiined, how
to proceed by
writhearnam.

If the bailiff return to the sheriff that he cannot have
view of the cattle, &c. distrained to deliver them, the

sheriff, by inquest of office, ought to inquire into the truth thereof; and if it be found by a jury, that the cattle are *eloigned*, the sheriff, in his county court, may award a *withernam* to take defendant's cattle. And if he will not award a *withernam*, then the plaintiff may have a writ out of Chancery, directed to the sheriff, rehearsing the whole matter, and commanding him to award a *withernam*; and if the sheriff then neglects, the plaintiff may have an *alias* and *pluries*, and after that an attachment against the sheriff. F. N. B. 158.

But if the replevin be in a superior court by writ, and the sheriff returns an *elongata*, then the plaintiff must sue a *capias in withernam* out of the superior court, and pursue such writ there. It has been said before, that a *capias in withernam* is a term which signifies a reciprocal distress, in lieu of the first which is *eloigned*; and is a command to the sheriff, to take other goods of the distrainer in lieu of the distress by him taken and *eloigned*, or withheld from the owner. So that there is then distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment for the illegal behaviour of the original distrainer: for which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming.

If a sheriff, in making replevin, be shewn a stranger's cattle or goods, and he takes them, trespass lies against him, for otherwise there would be no remedy; for being a stranger, he cannot have a writ *de proprietate probanda*. And were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of his goods. 1 Roll. Abr. 552. Com. Rep. 596. But Kelway seems to hold, that the action lies more properly against the person who shews the goods. Kelw. 119.

Sheriff not to take stranger's cattle, and how to satisfy himself thereon.

If the sheriff comes to make replevin of beasts impounded in another man's soil, and the place be inclosed, but has a gate open to the inclosure, he cannot break the inclosure and enter, where he may enter by the open gate. But if the owner hinders him, so that he cannot go by the open gate for fear of death, he may break the inclosure, and enter there. 20 Hen. 6. 28. 2 Roll. Abr. 552.

Of the power of sheriff in making replevin.

In all cases of misbehaviour by the sheriff, or other officers, in relation to *replevins*, they are subject to the king's superior courts, and punishable by *attachment* for such misbehaviour.

C. **C.** Of Removing the Suit from the County Court; and herein of the *Re. fa. lo.*

Who may remove the plaintiff, &c.

The replevin remains before the sheriff, &c. though the goods and chattels, &c. distrained are above the value of 40s. for the replevin, *alias*, and *pluries*, are all vicontiel writs, 2 H. 7. 5. b. and the suit may be determined in such inferior court; but the suit may be removed by either of the parties into the courts of B. R. or C. B. to be there determined; and that without any cause shewn.

How to remove it.

The method to be pursued in moving it, depends entirely on the manner in which the suit was commenced below.

By *pone*.

For if replevin be in the county court by *writ*, it must be removed into B. R. or C. B. by *pone*. F. N. B. 69. m.

By *recordari*.

If in the county court by *plaint*, it is removed by writ of *recordari facias loquelam* [commonly called a *resale*, for the sake of brevity]. F. N. B. 71. a.

By *certiorari*.

If replevin is in a court of record, that may hold plea in replevin, it must be removed by writ of *certiorari*, and can be removed in no other manner. 3 Mod. 56. —Per King, Ch. J. Hil. 3 Geo. 1. For a *resale* does not go to a court of record, because there the suit is already recorded.

And if the plaintiff is in the court of another lord, it may be removed into B. R. or C. B. by *recordari* to the sheriff, commanding him *quod accedas ad curiam & in plena curia ill' recordari facias*, &c. F. N. B. 70. b.

But it is said, that a replevin shall not be removed out of a court, which is not the king's court, without cause, neither by the plaintiff, nor by the defendant, Reg.

Reg. 85. b. 2 Inst. 339. for the prejudice that may come thereby to the lord.

All the above writs, to remove the suit from the inferior courts into B. R. or C. B. are in their nature *original writs*, and issue out of *Chancery*. But as the suit is almost usually commenced in the *county court* by *plaint*, and seldom or ever at this day by *writ*, I shall only shew the method of removing it when by *plaint*.

Of the nature of the above writs

In order to remove it, the party makes out a *prcipe* to the *curfitor* of the proper county, in the following form :

Bucks, to wit, Refalo for [either the plaintiff or defendant, naming him], of a plaint between C. D. & E. F. & G. H. for taking and unjustly detaining the cattle, goods, and chattels of the said C.

Of the proceedings by refalo.

Returnable from Easter in fifteen days.

Upon delivery of this *prcipe* to the *curfitor*, he makes out the writ, which must be carried to the under-sheriff of the county, who returns it of course.

[For the form of the writ of *refalo*, and the return, [Appendix T.] see Appendix T.]

If the sheriff returns the *recordari, tarde*, the party shall have an *alias*, &c. F. N. B. 70. b.

By the *recordari* nothing is removed but the *plaint*, even though the issue should be joined below. F. N. B. 71. a. Gill. Replev. 113.

And the *plaint* may be removed, though the plaintiff has discontinued there. *Ibid.*

The *plaint*, when removed into B. R., is filed with the *clerk* of the county ; as it is also when removed into C. B.

But upon removal of any other actions, except *replevin*, into C. B. the writ and proceedings are filed with the *prothonotary* there.

D. Of

D. Of the subsequent Proceedings, and of compelling the adverse Party to proceed.

What may be done by plaintiff if he removes suit ;

and defendant does not appear.
[Appendix T.]

Of the pone.

Distringas, &c.

What to be done by defendant if he removes the suit.

Of the filing the *resale*.

If the plaintiff removes the plaintiff, he should upon the return of the *resale*, file it with the plaintiff, &c. with the *filazer* of the county, and search for defendant's appearance; if the defendant has not appeared on or before the appearance-day of the return of the *resale*, the plaintiff should serve him with a rule to appear which may be had at *filazer*, and upon his non-appearance thereto sue out a *pone*. [See form Appendix T.]

The *pone* is got at *filazer's*; a summons is made out thereon at sheriff's office, and served upon the defendant by the officer. If no appearance is entered on or before the appearance-day of the return, get sheriff to return *nihil* on the *pone*, and sue out a *distringas* to be had at the *filazer's*; and proceed to levy thereon, as in vol. I. p. 229, where proceedings are by *clausum fregit*; only the issues may be greater; the first may be 4*l.* next 8*l.* and so on. If defendant does not appear, proceed with *distringas's ad infinitum*. If he does afterwards appear, he must pay the costs of the *distringas's*. Then declare *de novo*, not noticing the proceedings in the court below.

Rules may be afterwards given to compel defendant to avow, and so on as in common actions.

But if the *defendant* removes it, he must file the *resale* and return thereto with the *filazer*; and having entered an appearance, he must then give a rule for the plaintiff to declare; and for want of a declaration, when the rule is out, he may sign a *non pros* for not declaring, and immediately sue out a writ *pro retorno habendo*.

If *resale* not filed by the defendant on or before the appearance day of the return of the *resale*, notice must be given to plaintiff of the filing thereof by a demand in writing being made of declaration, before *non pros* can be signed; but if filed on the appearance-day of the return, such demand is not necessary. *Taylor v. Blaxland*,

Blaxland, P. R. 370. *Cooke's Rep.* 55. *James v. Moody*, 1 H. Blac. 281.

If the plaintiff has removed the cause, and does not declare or proceed therein; or if the defendant has removed it, and after having served the plaintiff with a rule to declare, and demanded a declaration, the plaintiff does not declare and proceed therein, the defendant may sign a *non pros* and judgment *pro retorno habendo*, and then sue out a writ *pro retorno habendo*, which he may obtain of the *filazer*.

How to compel plaintiff to declare.

If the defendant has taken out the *recordari facias loquelam*, and does not get it returned and filed within two terms, the plaintiff should apply to the *filazer* for a certificate that the same is not returned and filed; which certificate, when obtained, is a sufficient warrant for the *curfitor* to make out a writ of *procedendo*, which remands the cause to the county-court to be there determined. [For form of writ, see *Appendix T.*]

How to compel defendant to file *refalo*.

[Appendix T.]

If the *refalo* is not returned by the sheriff, so as to enable the party to file it, you must rule him to return the writ; it is a four day rule; if Sunday, the last day not reckoned. Whenever a *non pros* is signed, it is on a double half crown stamp paper in the usual way.

Of ruling sheriff to return *refalo*.

C. Of Proceeding by Plaintiff by Writ of second Deliverance, and by Defendant by Writ of Withernam.

C.

If the plaintiff, after judgment of *non pros* signed, and writ of *retorno habendo* sued out by the defendant, would wish to go on in his suit, he is at liberty so to do; and his application for that purpose must be made to the *filazer* for a writ of *second deliverance*; which writ of *second deliverance* is in the nature of a *superfedeas* to the writ *pro retorno habendo*, if brought before it be executed.

Writ of second deliverance its use and nature.

At the common law, if the plaintiff in replevin had been nonsuited, either before or after verdict, the defendant who distrained had judgment for a return, but not *irreplevisable*: So that the plaintiff might have had as many replevins as he would, which was vexatious and mischievous. To remedy which, the statute Westm.

How introduced.

Westm. 2. c. 2. restrains the plaintiff from having any more replevins after a nonsuit, but gives him a writ of *second deliverance*. 2 Inst. 340.

And if after such writ of *second deliverance* the plaintiff is non-prossed, or becomes nonsuited, or the plea be discontinued, or the writ abates, or he prevails not in his suit, the defendant then shall have judgment for a return *irreplevisable*. 2 Inst. 341. So that now, whenever the defendant succeeds, the return must be *irreplevisable*. *Gamon v. Jones*. 4 D. & E. 510.

If on or before the appearance-day of the return-day of the writ of *second deliverance*, the plaintiff declares, the subsequent proceedings are the same as in other cases throughout the cause.

Does not lie after judgment on demurrer or verdict.

No *second deliverance* lies after a judgment on demurrer, or after a verdict, or confession of the avowry; but in all these cases, the judgment must be entered with a return *irreplevisable*. But upon a nonsuit either before or after evidence, where the distress was not for rent, a writ of *second deliverance* will lie, because there is no determination of the matter; and there a writ of *second deliverance* lies, to bring the matter in question: but in the case of a demurrer and verdict, the matter is determined by law; and in the case of a confession it is determined by the confession of the party. 2 Lill. Reg. 457.

Writ of *withernam*, what.

If the plaintiff does not sue out a writ of *second deliverance*, and the sheriff should return to the writ *pro retorno habendo*, that the cattle, &c. were elained or removed to places unknown, by reason of which he could not return the same to the defendant, as by the said writ he was commanded, then upon such return of *elongata*, the defendant shall have a *capias in withernam*, to be had of the *filazer*. [For form thereof, see *Appendix T.*]

[Appendix T.]

Only *mesne process*.

The writ of *withernam* is but *mesne process*. *Ld. Raym.* 614. *Vide Comb.* 201. 2 *Salk.* 582.

Plaintiff may come in and declare, after *withernam* executed.

W. sued a replevin. H. removed it by *recordari* into the King's Bench; the plaintiff did not declare, and upon that a return was awarded to H. upon which the sheriff

sheriff returns *averia elongata*, and then a *withernam* was awarded and executed; afterwards the plaintiff came and prayed that he might be admitted to declare; and also prayed a deliverance of the cattle taken in *withernam*: and it was testified by the clerks, that upon the plaintiff's submission to a *fine* for not declaring, and that being imposed upon him by the judges, he shall have deliverance of the *withernam*: and a fine of 3*s.* 4*d.* being accordingly imposed on the plaintiff, he then declared, and had deliverance, Noy. 50, *Webb* and *Hind*; but said, that the course of B. R. is contrary to that of C. B.

If the sheriff should return *nulla bona vel catalla ad valorem*, &c. to the writ of *withernam*, the defendant may sue out an *alias copias in withernam*, and after that a *pluries*.

Of the alias and pluries.

§. Of the Declaration and Proceedings in the Court above.

§.

The *resale* being returned and appearance of defendant entered, plaintiff must declare *de novo*, nor need any notice be taken of the proceedings below; to the declaration defendant may plead in abatement or in bar, or he may avow in his own right, or make *confessance* in the right of another as his bailiff, or may justify, and the parties go on to issue or demurrer to be tried or argued, in the usual way.

When suit removed, plaintiff declares *de novo*.

Proceeding as in other cases.

But as both parties are actors in replevin, either of them may take down the record to trial, for which reason, there can be no judgment as in a case of a nonsuit in replevin; and if the defendant gives notice of trial and does not proceed, court will give costs against him.

Only either party may carry down record and no judgment, as in case of nonsuit.

Observations on Declaration and Pleadings.

The declaration in replevin may be laid in the county where the cattle or goods were taken, or in the county into which they were driven after the taking. F. N. B. 99. i.

Of the venue.

And the declaration ought to be not only of a taking in a ville or town, but also in *quodam loco vocat'*. But if the defendant would take advantage of his omission he must

Of the locus in quo.

must *demur* to the declaration. Hob. 16. *Bullithorp v. Turner*, C. B. Tr. 16, 17 Geo. 2.

Of description
of goods, &c.

The declaration must mention the cattle or goods demanded with such certainty, that the sheriff may make deliverance of them—and therefore it should mention the sorts or species, as sheep, cows, &c. Carth. 218.

If the cattle or goods are returned, the declaration should say, *wherefore he took, &c. and detained them against gages and pledges, until, &c.* 1 Saund. 347.

But if they are not returned, the declaration must be, *wherefore he took, &c. and still detains against gages and pledges.* Co. Ent. 610. b. Raft. Ent. 560.

So if only part are returned, it shall say as to that, *detained until, &c.* and as to the residue, *still detains.* Co. Ent. 611. b.

Attornment since the stat. 4 Ann. c. 16. need not be averred in a declaration for rent, nor in an avowry. Doug. 283.

But if the defendant would take advantage of a variance in the place where the taking is laid, from that in which it really was, he must plead it in *abatement*. 6 Mod. 103.

Of the plea of
prisal in auter lieu.

For *prisal in auter lieu* must be pleaded in abatement, and cannot be pleaded in bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 344. Show. 98. And because such plea concluded with a *petit judicium*, and a return which is in bar, it was held ill.

If defendant pleads *prisal in auter lieu*, he must go on and make an avowry *pro retorno*: yet such avowry is only a suggestion to bring him within the stat. 21 Hen. 8. c. 19. for damages. Before that statute no damages were given, and without such a suggestion he is not within the statute, but that being only for a particular purpose, is not traversable. Salk. 94.

Of the plea of
property.

But if he pleads *property*, he shall have a return without making an avowry: for on demurrer, the court of B. R.

B. R. resolved these points; 1st, That *property* may be pleaded either in bar or abatement; 2dly, That where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry: but where the plea in abatement is to the point of the action, as *property* is, the defendant shall have a return without avowry; for whether property be in defendant or a stranger, the defendant ought to have a return, because he had the possession which was illegally taken from him by the *replevin*, when the plaintiff had no right. *Butcher v. Porter*, Salk. 94. pl. 3.

Both plaintiff and defendant may plead or avow several matters, having first obtained the usual rule for that purpose.

Plaintiff in replevin may pay the rent into court, for which defendant avows. *Vernon v. Wynne*, 1 H. Blac. 24. Of paying rent into court.

Replevin for taking the plaintiff's goods and chattels, to wit, a lime kiln; avowry for rent; plea in bar that the lime kiln was affixed to the freehold; the court held the plea in bar bad, because it was a departure from the declaration, which had treated the lime kiln as a chattel. *Niblet v. Smith*, 4 T. R. 504. What shall be a departure.

Replevin for taking cattle in a certain place called the *Billis*, in a certain other place there called the *Boggs*, the defendant avowed the taking in the place, in which, &c. because H. was seised in fee of the *locus in quo*, &c. The plaintiff demurred, because here are two places alleged, and the avowant has only answered to the *locus in quo*, &c. which is but one of the two places. *Et per Cur.* it is a discontinuance. *Week v. Speed*, Salk. 94. What a discontinuance.

After joinder in *demurrer*, plaintiff obtained a rule for the avowant to shew cause why he should not discontinue on payment of costs; it was objected for the avowant, that a discontinuance in replevin is very different from a *non pros*; and that after a discontinuance, a *verdict de retorno habendo* could not be awarded. The court, however, did not enter into that matter, as the parties entered into a rule by consent to stay proceedings on payment of the rent arrear with costs. *Barnes*, 71. Of the effects of a discontinuance.

The

Parties cannot try by consent, without proceeding regularly.

The plaintiff's goods distrained were not replevied, but, by consent of the attornies on both sides, remained in the distrainers hands; and without any writ of *refale* or appearance in the court above, the plaintiff declared, the defendants avowed, and after long special pleadings, and after trial of the issues at the assizes, and a verdict for the plaintiff, the avowants moved to set aside all the proceedings; and the rule for that purpose was made absolute. The court held the agreement to be void, a fraud upon the revenue and officers, and an abuse of the court and the bar; and that they had no jurisdiction, and consequently could not give judgment. Barnes, 451.

SECTION III.

Of the Proceedings in Replevin when the Distress is for Rent.

A. How to make such Distress, and of selling the same.

B. How and when Replevin to be made, and of the Replevin Bond.

C. Of Removing the Suit into the Court above, and the Proceedings there.

3. A. How to make such Distress, and of selling the same.

Written authority to distrain.

The landlord himself, or any other person, as his bailiff, by an authority from him in writing, may make the distress. The warrant or authority may be in the following form. "To Mr. A. B., my bailiff, greeting—
"Distrain the goods and chattels of C. D. (the tenant) in the house he now dwells in (or on the premises in his possession), situate in _____ in the county of _____ for _____ pounds, being one year's rent, due to me for the same at Christmas day last, and for _____ you

"your so doing, this shall be your sufficient warrant
"and authority. Dated the day of 1795.
" J. S."

Being legally authorized to distrain, you enter on the premises, and make a seizure of the distress. If it be made in a house, seize a chair or other piece of furniture, and say, "I seize this chair, in the name of all the goods in this house, for the sum of pounds, being one year's rent, due to me (or to J. S. the landlord) at Christmas day last, by virtue of an authority from the said J. S. for that purpose (provided you distrain as bailiff)."

How to make distress.

Then take an inventory of so many goods as you judge will be sufficient to cover the rent distrained for, and also the charges of the distress. Make a copy thereof, as follows :

"An inventory of the several goods and chattels distrained by me A. B. this day of in the year of our Lord in the houses, out-houses, and lands (as the case is) of C. D. situate in in the county of by the authority and on the behalf of J. S. (provided you distrain as bailiff) for the sum of pounds, being one year's rent due to me, or to the said J. S. (as the case is) at Christmas day last.

The inventory.

"In the dwelling-house, two tables, two chairs, &c.
"In the barn, six hurdles, and so on."

At the bottom of the inventory, subscribe the following notice to the tenant :—

"Mr. C. D.

"Take notice, that I have this day distrained (or that as bailiff to J. S. your landlord, I have this day distrained) on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of pounds, being one year's rent due to me (or to the said J. S.) at Christmas day last, for the said premises; and that unless you pay the said rent, with the charges of distraining for the same, within five days from the date hereof, the
Vol. II. S " said

The notice to the tenant.

"said goods and chattels will be appraised and sold according to law. Given under my hand, the
"day of _____ in the year of our Lord

"W. T."

How served.

A true copy of the above inventory and notice must either be given to the tenant himself, or left at his house, or if there be no house, on the most notorious place on the premises. And it is proper to have a person with you when you make the distress, and also when you serve the inventory and notice, to examine the same, and to attest the regularity of the proceedings.

Of removing the goods.

The goods may be removed immediately, and in the notice the tenant may be acquainted where they are removed; but it is now most usual to put a man into possession, and let them remain on the premises till they are entitled by law to sell them*, which is on the sixth day inclusive, after the distress made, i. e. goods distrained on the Saturday, may be removed and sold on the Thursday afternoon following. *Wallis v. King* and another, 1 H. Blac. 13.

When they may be sold.

How, if further time required.

If the tenant require further time for the payment of the rent, and the landlord chuses to allow it, it is best to take a memorandum in writing from the tenant: "That he does consent that he should continue in possession of his goods and chattels in his house, (or upon the premises) for such a time longer, you having agreed not to sell them for that time, and that he will pay the expences of keeping possession." This memorandum prevents the landlord from being deemed a trespasser, which, after the expiration of five days, he otherwise would be, and might have an action of trespass brought against him for staying longer upon the premises.

Agreement for time purpose.

How to search for replevin and proceed to law.

If there is no allowance of, or agreement for, further time, search at the expiration of the five days at the Sheriff's office to see if the goods have been replevined.

* By the common law a distress was merely a pledge, and could be sold but to prevent landlords in the recovery of their rent, the Statute 2 W. & M. c. 5. s. 2. authorizes the sale of goods distrained, and, after five days from the making of the distress.

If not, and the rent and charges still remain unpaid, send for a constable* and two sworn appraisers, who having viewed the goods, the former must administer to the latter the following oath :

" You, and each of you, shall well and truly ap- Appraisers oath.
praise the goods and chattels mentioned in this in-
ventory (holding it in his hand), according to the best
of your judgment. So help you God."

Then indorse on the inventory the following

" Memorandum ; that on this day of Memorandum
in the year of our Lord A. B. of, &c. and thereof
C. D. of, &c. two sworn appraisers, were sworn up-
on the Holy Evangelists, by me J. K. of, &c. con-
stable, well and truly to appraise the goods and
chattels mentioned in this inventory, according to the
best of their judgment,

" As witness my hand,

" Present at the time J. K. Constable."
of executing the said
A. B. and C. D. as
above, and witness
thereto,

" L. M.

" O. P.

After the appraisers have valued the goods, continue the indorsement on the inventory as follows :

" We, the above named A. B. and C. D. being Appraisement.
sworn upon the Holy Evangelists, by J. K. the con-
stable above named, well and truly to appraise the
goods and chattels mentioned in this inventory, ac-
cording to the best of our judgment ; and, having
viewed the said goods and chattels, do appraise and
value the same at the sum of pounds. As
witness our hands the day of in the
year of our Lord

A. B. }
C. D. } Sworn Appraisers."

* It should be a constable of the hundred, parish, or place where such
goods are taken, and not one out of the district. Wallace v. King,
11. Mod. 14.

How disposed
of.

When the goods are thus valued, it is usual for the appraisers to buy them at their own valuation, and a receipt at the bottom of the inventory, witnessed by the constable, is usually held a discharge. But if the distress be of considerable value, it is much more advisable to have a proper bargain and sale between the landlord, the constable, the appraiser, and the purchaser.

The goods being disposed of, deduct the rent in arrear, and all reasonable charges attending the distress, and return the overplus (if any) to the tenant.

If the produce is not sufficient to cover the demand, you may distrain again.

How if any irregularity in proceedings.

Formerly the least irregularity in the above proceedings in making a distress, would make the parties trespassers *ab initio*; but now by the statute 11 Geo. 2. c. 19. it is otherwise, and the party aggrieved shall only have his action of trespass or on the case, for the special damage sustained by reason of such irregularity.

What actions
will lie.

Trover, therefore, will not lie for taking goods under a distress, though there might have been some irregularity. *Wallace v. King*, 1 H. Blac. 13.

B.

B. How to make Replevin, and of the Replevin Bond.

How to be replevied.

If the tenant means to replevy, he must, within five days after notice of the distress, take with him two housekeepers living in the city or county where the distress was made, and go to the sheriff's-office of such city or county, where he must enter into a bond with the two housekeepers, as sureties in double the value of the goods distrained, according to the statute 11 Geo. 2. hereafter mentioned; upon this the sheriff will direct a precept to one of his bailiffs, and the possession of the goods will be restored to the tenant to abide the event of the suit in replevin. See ante sec. 2. A.

What pledges
taken.

It has been before observed, sec. 2. A. that upon making replevin, two kinds of sureties were at common law taken by the sheriff, viz. for prosecuting the suit

and for returning the goods if a return were awarded. The first were merely nominal (*John Doe* and *Richard Roe*), but the second should be real responsible persons.

Sheriffs, however, gradually became remiss in their duty, and often neglected taking these pledges *pro replevino habendo*; or if any were taken, for the most part they were found to be indigent and irresponsible people; the stat. of 11 Geo. 2. c. 19. s. 23. for the better securing the payment of rents, and preventing frauds by tenants, enacts, "That to prevent vexatious replevins of distresses taken for rent, all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take, in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more credible witnesses or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer,) and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded before any deliverance be made of the distress."

Of the stat.
11 Geo. 2. and
of the replevin
bond.

And for the further protection of landlords and by way of putting the remedy into their own hands, it is so ordered by the same statute, "That such sheriff, or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant, or person making consurance, assign such bond to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment, so indorsed, be duly stamped before any action be brought thereon; and if the bond so taken and assigned be forfeited the avowant, or the person making consurance, may bring an action, and recover thereupon in his own name; and the court, where such an action shall be brought, may, by a rule of the same court, give such relief to the parties, upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeazance to such bond."

Of the assign-
ment of bond.

- Ⓒ. Of removing the Suit and Proceeding in Court above.

This is done in the same way as where the distress was not for rent. See *ante*, sec. 2. Ⓒ. D. C. f. So are the proceedings except in cases of nonsuit, or till the verdict, which see, *post*. sec. 5.

SECTION IV.

Of the Remedy in case of insufficient Pledges, whether Distress be for Rent or not.

- A. By Action against the Sheriff.
B. By Scire Facias against the Pledges.
C. By Proceeding on the Replevin Bond.

3. A. Of the Remedy by Action against the Sheriff

Sheriff must take bond.

The sheriff upon making replevin is compelled to take pledges, and they must be sufficient pledges, or an action on the case will lie against him; but the case will not proceed in a summary way, by granting an attachment against the sheriff for rejecting to take a replevin bond. *R. v. Lewis*, 2 D. & E. 617.

The remedy, if pledges be insufficient.

But in case pledges are taken, and they prove insufficient, the party has a double remedy, viz. against the sheriff, and against the bail: against the sheriff by action, and against the bail, if the distress was *not* for rent by *scire facias*; if *for rent*, either by *scire facias*, or upon the replevin bond, assigned according to the statute.

What pledges, if distress not for rent.

The pledges taken by the sheriff when the distress is not for rent, are according to the statute of Westm. 1. and may be by bond, and that too of the plaintiff himself only; for one is enough if responsible, though the statute uses the word pledges. *Gilb. Dict.* 68.

But the sheriff cannot take money or cattle as a pawn or pledge. Cro. Car. 322, *Moyser v. Gray*.

The pledges taken when the distress is for rent, are governed by stat. 11 Geo. 2. c. 19, and must be by bond with two sureties, and ought to be at least in double the value of the goods distrained. What, if for rent.

The sheriff, the under sheriff, and the replevin clerk, are all answerable to the defendant in replevin for the sufficiency of the pledges *de retorno habendo*. 2 Blac. 1220, *Richards v. Acton*. Who are answerable for insufficiency of pledges.

The general remedy is by action against the sheriff only, in which action some evidence must be given by the plaintiff of the insufficiency of the pledges; but very slight evidence is sufficient to throw the proof on the sheriff, for the sureties are known to him, and he is to take care that they are sufficient. *Saunders v. Darling*, Trin. 10 Geo. 3. 2 Crom. 229. What is the remedy.

This action against the sheriff will lie without any *scire facias*, previously sued out against the bail. *Pattison v. Prime*, Hil. 13 Geo. 2. Of the action against the sheriff.

But in the case of *Richards v. Acton*, 2 Blac. 1220, after judgment *pro retorno*, and an *eloignement* returned, the court on motion made a rule against the sheriff, under sheriff, and replevin, to pay the defendant 57*l.* 15*s.* the amount of the verdict in replevin, (damages and costs,) together with the costs of the application. Whether party can be relieved on motion.

Much doubt has been entertained as to the *quantum* of damages which the plaintiff ought to recover in an action upon the case against the sheriff, for taking insufficient pledges; and by the latest determinations the two courts still differ upon it. Of the quantum of damages.

In the King's Bench it is held, that the plaintiff cannot recover beyond the value of the distress. The argument is, that the duty of the sheriff, as prescribed by the act, is to take a bond for prosecuting the suit, and for a return of the goods, if a return shall be awarded. The bond therefore would be satisfied by returning the goods taken. If so, the value of those goods seems to be How in K. B.

Reason of their decision.

the true measure of damages to be given in the action. That by the stat. West. 2. it is specifically mentioned, that if any take pledges otherwise, he shall answer for the price of the beasts. And that the 11 Geo. 2. does not enlarge the sheriffs responsibility in this respect.

How in C. B.

But in the Common Pleas, the direct contrary is holden, and there the plaintiff may recover the amount of his rent, his costs in the replevin suit, the value of the goods, and whatever other damages the jury may give him, even beyond the penalty of the replevin bond, *i. e.* more than double the value of the goods distrained.

Reason of their determination.

As the court, in giving judgment in this case, were aware of the contrary determination in the King's Bench, they thought proper to give their reasons for differing in opinion, and to enter fully into the law of the subject; which as it may be explanatory of this doctrine of pledges, and of the alteration made in the common law by the statutes, West. 2. and 11 Geo. 2., it may not be improper to give in this place.

History and origin of the pledges, and of the alterations made by the stat. West. 2. and 11 Geo. 2.

At common law the sheriff, on delivering the goods, took pledges to prosecute, who were to answer the amercement. By the stat West. 2. "He who delivered the goods, was also to take pledges for the return of the beasts or the price of them." and it appears from 2 Inst. 340. "That if he took insufficient pledges, they were no pledges within that statute, and the sheriff was charged by it as if he had taken no pledges at all." At that time then the sheriff was liable to answer the value of the goods. From thence down to the 21 Hen. 8. there could be no question as to costs, as there were no costs given to the avowant, before the passing of the stat. 21 H. 8. c. 19. But it appears from 2 Inst. 107 and 341, that after judgment of return irreplevisable, the lord or avowant was not bound to return the cattle, unless not only the arrearages of rent were tendered, but also "all that was done upon the judgment in avowry."

Thus the law stood till the act 11 Geo. 2. c. 19. was made; the last section of which was to remedy the mischiefs of vexatious proceedings in replevin. In this section

section also, the case is supposed that the bond which is the additional security might be forfeited. If so, the penalty is a debt, and judgment must be entered up to the extent of it; but in the same section there is an equitable jurisdiction given to the court, to qualify the penalty by giving such relief to the parties upon the bond, as may be agreeable to justice and reason, by rule of court, which shall have the nature and effect of a discharge to the bond. This made a material alteration in the law with respect to the relief which the landlord has, where the replevin is vexatious: as the judgment is for the whole penalty, it must cover according to the equitable jurisdiction of the court, all that has been lost by the proceeding: there would be no equity, it would not be "agreeable to justice and reason," unless the whole were covered. If therefore an action were brought on the security given by the statute, the party would be entitled to the whole. The only question then is, how far he shall be entitled where he does not proceed upon the statute. In *Prowse v. Pattison*, (Bul. Ni. Pri. 60.) it was decided after great doubt that an action on the case would lie. What then is the measure of damages in an action on the case against an officer, for neglecting the duties of his office? What has the plaintiff lost by the neglect? This is a culpable neglect, not merely a simple non-feasance, and must have been accompanied with a bad intention. The rule then must depend upon what damages the party has sustained. The great doubt we have had, has been, whether we could go beyond the penalty of the bond. But this is the same sort of question, as whether an action on the case would lie; and there is no rule which says, that in an action on the case for an injury accompanied with a bad intent, less shall be recovered than the whole damages sustained. The verdict therefore must be entered for the whole sum found by the jury. *Concannon v. Letbridge*, 2 H. Blac. 40.

E. Of the Remedy by *Sci. fa.* against the Pledges.

B.

Another remedy which the defendant in replevin has, if the plaintiff does not make a return of the goods, when a return has been awarded, is, by *scire facias* against

Of the remedy
by *sci. fa.*

against the pledges. Before a *scire facias* issues, a writ *pro retorno habendo* must have been sued out, and an *elongata* or *eloignement* be returned by the sheriff. After which, if the names of the pledges be not known, an application may be made to the replevin clerk, and if he refuses or delays to tell them, the court on motion will make a rule upon him for that purpose. 2 Blac. 1220.

If the plaint has never been removed, defendant may sign a *non pros* in the court below, and have a precept in the nature of a *sci. fa.* 2 Will. 41.

N. B. The two remedies above-mentioned, are used where the distress is not for rent, as well as when it is.

C.

C. Of the Remedy on the Replevin Bond.

Of the remedy
on replevin
bond.

The usual remedy where the distress is for rent, and a replevin bond is entered into, according to 11 Geo. 2. is by taking an assignment of the replevin bond, and bringing an action thereon against the pledges in defendant's own name.

By the statute, the sheriff is ordered, at the request and costs of the avowant, or person making consufance, to make such assignment. See *ante*, B.

Who is entitled
to the assign-
ment.

By the above words it might seem as if the defendant must first avow or make consufance, to entitle himself to an assignment of the bond; but there is no occasion for either; and even if the plaintiff in replevin does not appear at the county court, according to the condition of the replevin bond, and although no steps are taken in the court below, nor the proceedings removed into the superior court, yet the defendant may demand such assignment, and may sue in the court above as assignee of the sheriff, averring in his declaration, that plaintiff did not appear at the next county court, and prosecute according to the condition of the bond. *Dias v. Freeman*, 5 D. & E. 195.

When assign-
ment to be
made, and of
the proceedings
thereon.

The bond may be assigned four days exclusive after the time limited therein for plaintiff to prosecute his suit.

The

The mode of assigning and proceeding on replevin bond is the same as on bail bond, which see vol. I. ch. 4. sec. 7.

The action must be brought in the same court in which the *resale* is returnable.

To what amount plaintiff in the action is entitled to recover in the courts of K. B. and C. B. see above in this section, B. To what amount damages may be.

SECTION V.

Of the Non Pros, Nonsuit, Verdict, and Judgment.

A. When the Distress is for Rent, under the Statute 17 Car. 2.

B. When the Distress is not for Rent, or not under the Statute.

If the cause has been removed into the superior court by the *plaintiff*, and after the defendant has appeared he does not declare or proceed therein; or if the cause has been removed by the *defendant*, and a rule being served on the plaintiff, he does not declare or proceed therein; the defendant may sign a *non pros*, enter up judgment *pro retorno habendo*; and if the *original distress* was made for rent, he may proceed to execute a writ of inquiry of damages, which is the better way than taking out a writ *pro retorno habendo*; because that writ may be superseded by the plaintiff's suing out a *writ of second deliverance*, as was seen before. For by the stat. 17 Car. 2. c. 7. an

act for the more speedy and effectual proceeding upon distresses and avowries for RENTS, reciting, that "Forasmuch as the ordinary remedy for arrearages of rents, is by distresses upon the lands chargeable therewith; and yet nevertheless, by reason of the intricate and dilatory proceedings upon replevins, that remedy is become ineffectual:" It is enacted, "That whensoever any plaintiff in replevin shall be nonsuit before issue joined, in any suit of replevin by plaint or writ lawfully

Stat. 17 Car. 2.
If plaintiff be nonsuit before issue joined.

Suggestion to be made.

A writ of inquiry to issue,

and execution by *fi. fa.* or *elegit*.

If nonsuit after issue joined, or in case of verdict jury to assess, &c.

How on demurrer.

Party may distrain again, if first distress not sufficient.

“lawfully returned, removed or depending in any of the
 “king’s courts at Westminster, that the defendant
 “making a *suggestion*, in nature of an avowry or con-
 “nuisance for such rent, to ascertain the court of the
 “cause of distress, the court upon his prayer shall
 “award a writ to the sheriff of the county where the
 “distress was taken, or inquire by the oaths of twelve
 “good and lawful men of his bailiwick, touching the
 “sum in arrear at the time of such distress taken, and
 “the value of the goods or cattle distrained: and there-
 “upon notice of fifteen days shall be given to the
 “plaintiff, or his attorney, in court, of the sitting of
 “such inquiry: and thereupon the sheriff shall in-
 “quire of the truth of the matters contained in such
 “writ, by the oaths of twelve good and lawful men of
 “his county: and upon the oath of such inquisition,
 “the defendant shall have judgment to recover against
 “the plaintiff the arrearages of such rent, in case the
 “goods or cattle distrained shall amount unto that
 “value: and in case they shall not amount to that va-
 “lue, then so much as the value of the said goods and
 “cattle so distrained shall amount unto, together with
 “his full costs of suit: and shall have execution there-
 “upon by *feri facias* or *elegit*, or otherwise, as the law
 “shall require. And in case such plaintiff shall be
 “nonsuit after nuisance or avowry made, and issue
 “joined, or if the verdict shall be given against such
 “plaintiff, then the jurors that are impannelled, or re-
 “turned to inquire of such issue, shall, at the prayer of
 “the defendant, inquire concerning the sum of the
 “arrears, and the value of the goods or cattle distrain-
 “ed: and thereupon the avowant, or he that makes
 “nuisance, shall have judgment for such arrearages,
 “or so much thereof as the goods or cattle distrained
 “amount unto, together with his full costs, and shall
 “have execution for the same by *feri facias* or *elegit*,
 “or otherwise as the law shall require.”

Sec. 3. gives the like remedy to the avowant, &c. upon a judgment given for him upon demurrer.

And *sec. 4.* enacts, “That in all cases aforesaid,
 “where the value of the cattle distrained as aforesaid
 “shall not be found to be the full value of the arrears
 “distrained

“ distrained for, that the party to whom such arrears
“ were due, his executors or administrators, may, from
“ time to time, distrain again for the residue of the
“ said arrears.”

By the above statute, in case of a nonsuit or *non pros* before issue joined, defendant may enter a suggestion upon the record, in the nature of an avowry or confession, and thereupon sue out a writ of inquiry; but in case of a nonsuit at the trial, or of a verdict for defendant, the jury at the trial must inquire of the rent in arrear and the value of the goods distrained.

If they omit to make such inquiry, no other jury can afterwards make it; no writ of inquiry therefore can go, the defendant cannot enter his judgment according to the statute and proceed to execution by *fi. fa.* or *ca. sa.*, but must resort to his common law judgment, and sue out his writ *pro retorno habendo*. *Tucket v. Stephens*, Carth. 362. 1 Lev. 255. See also *ante*, ch. 14. sec. 1. B. 1.

Jury at the trial must inquire, &c.

And this, if the jury omit to inquire either of the rent or the value of the goods, for they must assess both; the statute must be strictly complied with.

How if they omit so to do.

But this is only in cases of rent within the statute; for other cases of nonsuit, see *post*, §.

If the plaintiff become nonsuit, the defendant is not bound to take his remedy under the statute, but has his option either to proceed by writ of inquiry under it, or bring his action against the plaintiff and his sureties on the replevin bond. *Waterman v. Yea*, 2 Will. 41.

Party not bound by the statute.

Nor does the statute take away or alter the judgment at common law, it only gives a further remedy to the avowant.

Nor is the judgment altered thereby.

So that after a *non pros*, plaintiff may still enter his judgment *pro retorno*; but it is better to make a suggestion, and proceed by writ of inquiry; because, if plaintiff sue out a writ of second deliverance, it will operate as a *superfedeas* to the *return habend'*, but not to the writ of inquiry. *Cooper v. Sherbrook*, Bar. 426. 2 Will. 116.

How judgment may still be.

For

For by this statute the legislature intended that the proceeding by writ of inquiry, *fi. fa.* and *elegit* should be final for the avowant to recover his damages, and that the plaintiff should keep his cattle notwithstanding the course of awarding a *retorno habendo*, which is the right judgment, and it is still entered up as before the statute. 2 Wils. 117. Carth. 253.

In what cases plaintiff will be let in after non-suit.

If the plaintiff is nonsuited for want of delivering a declaration, if it was through any cause that would have entitled him to a writ of *second deliverance*, as sickness of the person employed, &c. the court will order the defendant to accept of a declaration on payment of costs: otherwise, the plaintiff would be remediless, the writ of *second deliverance* being taken away by the 17 Car. 2. in cases of *rent*. Vent. 64.

If verdict for defendant how the judgment to be.

Where the judgment is for defendant after verdict, if the jury have not inquired at the trial as the statute directs, it must be entered up, as has been before observed, as a common law judgment, *pro retorno habendo*.

But if the jury have assessed damages, but not the amount of the rent, &c. it may be entered as a judgment under the 21 H. 8. c. 19. *Gamon v. Jones*, 4 D. & E. 509.

How it may be amended.

And the court will permit defendant to amend his judgment, if entered as under the statute, and not warranted thereby, to make it a common law judgment.

Even after writ of error.

Where the defendant in replevin made conusance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his conusance, without finding either the amount of the rent in arrear, or the value of the cattle distrained, and judgment was entered for the damages assessed, the court permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo*, after a writ of error brought. *Rees v. Morgan*, 3 T. R. 349.

B. Of the Verdict and Judgment in Cases not within 17 Car. 2.

B.

We have hitherto only treated of the judgment and execution in cases of rent, under the statute of 17 Car. 2. it remains to shew what the judgment is when the distress is not for rent, or defendant does not proceed under that statute. At common law, (even before the statute of Gloucester,) the plaintiff in replevin could recover damages, and by that statute his costs. But the avowant or defendant in replevin was entitled to neither till the 7 Hen. 8. c. 4. which gives damages and costs to every avowant, and to every person making conusance, or justifying as bailiff in replevin, for any rent, custom, or service, if his avowry, conusance, or justification be found for him, or the plaintiff be otherwise barred. And by the stat. 21 Hen. 8. c. 19. it is enacted, "That every avowant, and every other person or persons that make any avowry, justification, or conusance, as bailiff or servant to any person or persons in any replegiare or second deliverance, for rents, customs, services, or for damages feasant, or rent or rents upon any distress taken in any lands or tenements, if the same avowry or conusance, or justification, be found for them, or the plaintiffs in the same nonsuit, or otherwise barred, that then they shall recover their damages and costs against the said plaintiffs, as the same plaintiffs should have done or had, if they had recovered in the replegiare, or second deliverance found against the defendants."

Of plaintiff's
damages and
costs.

Of defendants.

Neither this statute, nor the 43 Eliz. [if the defendant avows as overseer for a distress for a poor rate], tie the inquisition up to the *same jury* as are returned or impanelled, as the 17 Car. 2. c. 7. does. Salk. 95.

Same jury need
not assess them.

If therefore there is a verdict for the *plaintiff*, the jury usually assess the damages. 2 Saund. 315.

How if the
verdict be for
plaintiff.

Or the jury after verdict may be dismissed, and damages assessed by the justices, with the defendant's consent.

Or

Or if the jury do not assess the damages, and the goods, &c. should be detained, the plaintiff may make a suggestion thereof upon the roll, whereupon a writ shall go to inquire of the value of the cattle, &c. and damages; upon which the plaintiff shall have judgment for both. *Derwell v. Marshall*, 3 Will. 442.

How if judgment for plaintiff, by confession or default of defendant.

If there is judgment for the plaintiff upon a *relicta verificatione, cognovit actionem, nil dicit*, &c. or for want of a replication to his plea in bar to the avowry, or upon a demurrer, a writ of inquiry of damages shall be awarded. Com. Dig. 5 vol. 303.

Or at the request of the plaintiff, by the assent of the defendant, the justices may assess the damages without a writ of inquiry.

But if there is judgment for the plaintiff in replevin, *quod adhuc detinet* by default after appearance, there shall be a special writ of inquiry for the value of the goods or cattle and damages. F. N. B. 69. l. Co. Ent. 611. a.

But where the taking was lawful, the damage shall be only for the detainer, as where goods are taken *damage feasant*, and detained after amends tendered. F. N. B. 69. t. g.

Of judgment for defendant by default, &c.

If plaintiff lets judgment go by default, or becomes nonsuit, defendant is entitled to his judgment *pro retorno*, and to a writ of inquiry to assess his damages and costs; or if the defendant get a verdict, the jury may assess the damages, or if they omit so to do, a writ of inquiry may go.

Of judgment for defendant after verdict.

The judgment after verdict for defendant need not express the return to be irrepleviable, because now it necessarily must be so, since the statute West. 2. Sec. ante, *AD*.

Therefore a judgment in replevin, "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury, &c." is good either as a judgment at common law, though the return be not adjudged irrepleviable, or as a judgment under 21 H. 8. c. 19. which entitles the defendants to damages

damages and costs, but not under the statute 17 Car. 2.
Gamon v. Jones, 4 D. & E. 510.

If the defendant, upon the judgment *de retorno habendo*, sue out a writ *pro retorno habendo*, and the sheriff cannot find the cattle, he may have a *capias in withernam*, upon the return of *elongata*. 2 Leon. 174.

Of the *capias* in withernam.

But if the defendant has a judgment for a *return irreplevisable*, if the owner of the cattle or goods tenders all that is due on the judgment, and it is accepted, he shall have a *writ of delivery* for the goods. 2 Inst. 107.

Of the tender after judgment.

So if he tenders the whole upon the judgment, which is ascertained upon the avowry, and is refused, he shall have *detinue*. 2 Inst. 107.

In avowry for *damage feasant*, defendant had a verdict, and adjudged that he shall have a *return. habend.* for the cattle, and a *ca. fa.* for the damages; but if the party tender the costs and damages, the sheriff, after such tender, ought not to execute the *return. habend.*

But if for want of such tender the sheriff doth execute the *return. habend.* and afterwards the costs and damages are paid, a writ *si constare poterit* lies upon suggesting that the costs, &c. are paid, and this is to redeliver the distress, and is called a *writ of restitution*. Cro. Car. 162. 3 Salk. 54.

Of the writ of restitution.

It is now settled that pleadings in replevin are within the stat. 4 Ann. c. 16. therefore, where some issues in the replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge shall certify that the plaintiff had probable cause for pleading the matters on which those issues are joined. *Dodd v. Joddrell*, 2 T. R. 235.

Of the costs of the issues according to 4 Ann. c. 16.

An avowant shall pay costs on the special avowries found against him. *Stone v. Forsyth*, Doug. Rep. 709.

And shall not have costs on the affirmance of a judgment in his favour on a writ of error. *Ib.* 709.

Of double costs
under 11 Geo.
2. c. 19.

The stat. 11 Geo. 2. c. 19. s. 22. gives the defendant or defendants in *replevin* making avowry, or conuſance upon diſtreſſes for *rent, relief, heriot, or other ſervice*, in caſe the plaintiff in the action ſhall become *nonſuit, diſcontinue, or have judgment* againſt him, *double coſts*.

But where the defendant avowed the taking and detaining an ox, as a ſeizure for *heriot cuſtom*, (claiming no right to diſtrain,) and plaintiff became nonſuit, and the prothonotary had allowed defendant double coſts, taking the caſe to be within the ſtat. 11 Geo. 2. the court, on motion that the prothonotary might review his taxation, made the rule for that purpoſe abſolute; holding, that the avowry not being for taking the ox as a *diſtreſs*, is out of the ſtatute. For *heriot ſervice*, cattle, &c. are diſtrainable; for *heriot cuſtom* not. *Lloyd v. Winton*, Barnes, 148. 2 Will. 28.

For further information on coſts in *replevin*, ſee Hullock's Law of Coſts.

IV. Of the *Scire Facias*.

Sci. fa. what.

It is an action.

A *ſcire facias* is not an original but a judicial writ, founded on ſome matter of record, as a judgment, recognizance, or letters patent, on which it lies, either to enforce the execution of them, or to vacate or ſet them aſide. But though in ſtrictneſs it is a writ judicial or of execution, yet in a certain degree it is in the nature of an original, and is therefore properly called an action, ſo that a releaſe of all actions or executions is a good plea in bar to a *ſci. fa.*, and upon this ground it is that a plea to a *ſci. fa.* ſhould conclude, "if the plaintiff ought to have or maintain his action," &c. 2 Will. 251. *Fenner v. Evans*, 1 D. & E. 267.

In what caſes it lies.

A *ſcire facias* lies for many purpoſes in law, the writ being formed according to the ſubject matter. But the writs of *ſci. fa.* proper to be noticed in this work are—the *ſci. fa.* againſt bail after judgment had againſt the principal on their recognizance forfeited, and the *ſci. fa.* to revive judgments, and to continue ſuits.

Of the proceedings by *sci. fa.* against bail, we have already treated; see ch. 15. sec. 4. It only remains to consider of the *sci. fa.* to revive judgments and continue suits, which may be divided into the following heads:—

SEC. 1. *Of the Scire Facias to revive a Judgment, by and against the same identical Parties to the Suit on which the Judgment was had.*

SEC. 2. *Of the Scire Facias to revive a Judgment by or against the Representatives of either Party dying after Judgment and before Execution.*

SEC. 3. *Of the Scire Facias to continue a Suit by or against the Representatives of either Party dying before final Judgment.*

SEC. 4. *Of the Scire Facias to revive Judgments or continue Suits, where the Parties are changed either by Bankruptcy or Marriage.*

SEC. 5. *Of the practical Proceedings by Scire Facias in all the above Cases.*

SECTION I.

Of the Scire Facias to revive a Judgment by and against the same Parties.

It has been just observed that a *sci. fa.* is an action; for this reason a *sci. fa.* to revive a judgment is within the clause of the annuity act 17 Geo. 3. c. 26. commanding that no action shall be brought on any judgment already entered. *Fenner v. Evans*, 1 D. & E. 267.

Scire facias an action within 17 Geo. 3.

But properly speaking, a *scire facias* to revive a judgment is only the continuation of an action. It is a step leading to the execution of a judgment already obtained; it is but the enforcing of the original demand for which the action was brought. In a word, the *sci. fa.*

It is properly a continuation only of an action.

Why.

fa. to revive judgments, creates nothing anew, but may be said only to reanimate that which before had existence, but whose vital faculties and powers are, as it were, suspended, and, without the salutary interference of the *sci. fa.*, would be wholly lost.

Bankrupt not
liable to costs of
sci. fa.

It is upon this ground, (viz. that a *sci. fa.* is only the continuance of an action,) that if a bankrupt be discharged from the original judgment, so he will from the costs of the *sci. fa.* though the latter were sued out after his bankruptcy. *Philips v. Brown*, 6 D. & E. 283.

Any agreement
in the original
action binding
in proceedings
on *sci. fa.*

So, if in the original action the plaintiff agrees not to bring a writ of error, his representatives upon the judgment being revived against them by *sci. fa.* shall be bound by such agreement. *Executors of Wright v. Nutt*, 1 D. & E. 388.

How far *sci. fa.*
lay at common
law.

It was formerly doubted whether a *sci. fa.* to revive a judgment lay at common law, but this doubt, says Lord Coke, arose for want of distinguishing between personal and real actions. 2 Inst. 409. In real actions, if execution was not sued within the year, a *sci. fa.* lay for the land, because no other advantage could be taken of the judgment, as an action of debt could not be maintained thereon; but in personal actions the party had a remedy by action of debt on the judgment, therefore no *sci. fa.* could issue; so in mixed actions, as an assize, writ of annuity, and ejectment, a *sci. fa.* lay. But the *sci. fa.* in all personal actions is given by stat. West. 2. c. 45.

How given by
statute.

How now used
when judgment
a year old.

Now, therefore, after judgment obtained in a personal action, whether obtained by plaintiff or defendant, for a judgment of nonsuit is governed by the same rule, if the execution is not sued out within a year and a day after signing the judgment, no execution can go until a *sci. fa.* is sued out to revive the judgment, and a judgment on such *sci. fa.* has been obtained; except in the case of the king, when there need not be any *sci. fa.* 2 Sal. 603. Ray. 328.

A year and a day is certainly ample time for the party who has obtained judgment to carry it into effect, and if he neglects so to do, it is but just that proper notice should

should be given to the other side of his intention to put it in force, that he may not be taken by surprize; and this is the use and meaning of the proceedings by *sci. fa.*

For this reason, if the delay is not occasioned by the party entitled to the judgment, but by the defendant himself; or if it were by agreement between the parties, then execution may issue without any such *sci. fa.* See ch. 12. 15. Tit. Execution, for cases on this head.

Unless delay occasioned by defendant.

As if there be a *cesset executio*; but then execution must issue within a year after the *cesset executio* is determined.

Or by *cesset executio*.

But if execution were sued out within the year and returned, but from which the plaintiff had no benefit, there needs no *sci. fa.* afterwards, but that execution may be continued down on the roll, by *vicecomes non misit breve* to any distance of time; but the writ of execution must be returned by the sheriff and filed, or such continuances cannot be entered. *Blayer v. Baldwin*, 2 Will. 83. Bar. 213. Carth. 283. 2 Show. 235. *Aires v. Hardrefs*, Str. 100.

Or writ of execution has been sued out and returned.

In like manner, if the plaintiff delay executing a writ of inquiry, till a year after the interlocutory judgment, there must be a *sci. fa.*

How in cases of writ of inquiry.

If the plaintiff does not proceed upon the first *sci. fa.* within a year and a day, he cannot afterwards proceed on that writ, but must sue out a new *sci. fa.* for the old writ is discontinued.

The *sci. fa.* must be proceeded on within the year.

An execution had, after a year and a day, without a *sci. fa.* is not void, but voidable. 3 Lev. 140. Sal. 273.

Execution without *sci. fa.* only voidable.

For the manner of suing out the *sci. fa.*, appearing thereto, and proceeding in the action, see *post*, sec. 5.

SECTION II.

Of the Scire Facias to revive a Judgment by or against the Representatives of either Party dying after final Judgment.

If same parties to the suit not alive, *sci. fa.* must issue before execution.

When a judgment has been obtained, it is not only necessary that the fruits of such judgment should be reaped by suing out execution in due time, namely, within the year and day, but also that at the time of such execution issuing, the same persons who were the parties to the suit should be living; if therefore after such judgment, but before execution, either the plaintiff or defendant dies, the judgment must be revived by *sci. fa.*, by or against the representative of the deceased, before any execution can issue. 2 Ld. Ray. 768. Lutw. 1273.

How if plaintiff die.

And if the plaintiff in the action dies, his representatives must prove the will, or take out letters of administration, (as the case may be,) before such *sci. fa.* is sued out. 6 Mod. 134. 7 Mod. 15.

If defendant die in the vacation.

But if the defendant die in the vacation, and the judgment be not a year old, it is said, the plaintiff may levy without a *sci. fa.* Imp. C. B. 510. K. B. 431. 1 Sal. 87. 2 Str. 1081.

Though in a late case, where judgment on a warrant of attorney was entered in Easter vacation against a defendant who died in Easter term, the judgment was held good, because it related to the first day of the antecedent term, but it was held that execution could not be taken out upon it, until it were revived by *sci. fa.* against the defendant's executor. *Heapy v. Parris*, 6 D. & E. 368.

If *fi. fa.* be sued out before their death.

So, if a writ of *fi. fa.* be actually sued out, but before execution thereof defendant dies, there is no need of a *sci. fa.* but the goods may be seized under that writ in the hands of his representative. *Farrer v. Brooks*, 2 Crom. 105.

If

If it be a joint judgment against two, and one of the defendant's die, a *sci. fa.* lies against the other alone, reciting the death. 4 Bac. Abr. 419. If it be a joint action and one dies.

But it is said, that if the action be by two, and one of the defendants die after judgment, execution may be sued in the name of both without a *sci. fa.* Noy, 150. Show. 404. Carth. 194.

If an executor or administrator obtains judgment and dies before execution, the administrator *de bonis non*, &c. shall have a *sci. fa.* upon such judgment. Stat. 17 Car. 2. c. 8. Cro. Car. 167. If executor obtains judgment and dies.

If an administrator *durante minoritate* brings an action and recovers and then his time determines, the executor may have a *sci. fa.* upon that judgment. Lev. 181. 2 Vern. 25. Or administrator *durante minoritate*.

If there be several executors and one an infant, who therefore cannot prove the will, those of full age who have proved, may bring the *sci. fa.* and it shall be good. *Hutton v. Mascall*, 1 Lev. 181. 2 Saund. 212. If several executors and one an infant, how *sci. fa.* may go.

If an executor brings a *sci. fa.* on a judgment, or a recognizance, and gets a judgment *quod habeat executionem*, and dies intestate, the administrator *de bonis non* must bring a *sci. fa.* upon the original judgment, and cannot proceed upon the judgment in the *sci. fa.* Ld. Raym. 1049. If executor gets judgment on *sci. fa.* and dies.

For the manner of suing out *sci. fa.*, appearing thereto, declaring thereon, &c. see *post*, sec. 5.

SECTION III.

Of the Scire Facias to continue a Suit by or against the Representatives of either Party dying before final judgment.

At common law, the death of either party at any time pending the action, *i. e.* before final judgment obtained, abated the suit, even though it happened after verdict, How suit abated at common law by death of either party.

or judgment by default; and if it were a joint action, the death of any one of the plaintiffs or defendants abated it.

How altered in joint actions by stat. 8 & 9 W. 3.

But now in all cases of joint actions, if one of the plaintiffs or defendants die pending the action, the suit shall not abate, but a suggestion may be entered on the roll of such death, and the proceedings may be continued without any *sci. fa.* in the name or names of the survivors. Stat. 8 & 9 W. 3. c. 11. s. 7.

How in other cases by stat. 17 Car. 2. c. 8. and 8 & 9 W. 3. c. 11.

And if the action is not a joint one, and the plaintiff or defendant should die pending the suit, yet if such death happen after verdict or interlocutory judgment, the suit shall not abate, but may still be continued to execution by or against the representatives of the party deceased.

But if such death happens before verdict or interlocutory judgment, the suit still abates.

2.

A. How if Plaintiff or Defendant die after Verdict and before Judgment.

First, if either party die between the verdict and judgment, stat. 17 Car. 2.

By the 17 Car. 2. c. 8. In all actions personal, real, or mixed, the death of either party between the verdict and the judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict.

And "where any judgment after a verdict shall be had by or in the name of any executor or administrator in such case, an administrator *de bonis non* may sue forth a *scire facias* and take execution upon such judgment."

In case, therefore, of the death of the party after a verdict, but before judgment, the judgment must be entered within two terms after the verdict, it is entered generally as if the party were living; and a general *sci. fa.* not a special one, is sued out by or against the representative of the deceased, to shew cause why execution should not issue. *Ld. Ray.* 1280.

But

But though the judgment is warranted by the statute, and is entered in the name of the deceased, yet if execution be taken out without a *sci. fa.* it will be set aside. *Carl v. Brown*, 1 Will. 302.

If either party die after the assizes begin, though before the trial and verdict, it shall be within the statute, because the assizes are but one day in law. *Ld. Ray.* 1415.

26. How if either Party die after Interlocutory and before final Judgment.

26.

By the 8 & 9 W. 3. c. 11. s. 6. it is enacted, "That in all actions commenced in any court of record, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff; and if the defendant die after such interlocutory judgment, and before final judgment therein obtained, the said action shall not abate, if such action might be originally prosecuted or maintained against the executors or administrators of such defendant: and the plaintiff, or if he be dead, after such interlocutory judgment, his executors or administrators, shall and may have a *sci. fa.* against the defendant, if living after such interlocutory judgment; or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or allege any matter sufficient to arrest the final judgment, or being returned warned, or upon two writs of *sci. fa.* it be returned, that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the country, shall make default; that thereupon a writ of inquiry of damages shall be awarded, which being executed and returned, judgment final shall be given for the said plaintiff, his executors or administrators, prosecuting
" such

Secondly, if either party die after interlocutory and before final judgment, stat. 8 & 9 W. 3. c. 11. s. 6.

"such writ or writs of *sci. fa.* against such defendant, his executors or administrators respectively."

The former statute, 17 Car. 2. makes the judgment good, as entered between the parties themselves to the suit, though one died after the *verdict*, and before the judgment entered.

But by the stat. of 8 & 9 W. 3. if a defendant dies after interlocutory judgment, the final judgment must be against the representatives, for they are expressly taken notice of for that purpose; and the *sci. fa.* against them must appear on the same record. Salk. 42.

After writ of inquiry executed.

If a defendant dies after a writ of inquiry executed, and before the return thereof, it is within this act; and the *scire facias* against his executor or administrator must be to shew cause, why the damages assessed should not be recovered. *Goldsworthy v. Southcot*, B. R. 1 Will. 243. 1 D. & E. 388, *Executors of Wright v. Nutt*.

What case within the statute.

The defendant died after the rule was out, but before the time given to plead by a judge's order expired; and the plaintiff signed an interlocutory judgment, and sued out a *sci. fa.* against the defendant's executor upon this statute, to shew cause why damages should not be assessed and recovered; but on motion, the court set aside the proceedings for irregularity, as the writ abated by the death of the defendant before interlocutory judgment was signed, notwithstanding the rule to plead was out. And so held in *Sibert v. The Executor of General Russel*, Mich. 9 Geo. 2. *Wallop v. Irwin*, 1 Will. 315.

For the manner of suing out *sci. fa.* appearing thereto, declaring thereon, &c. see *post*. sec. 5.

SECTION IV.

Of the Scire Facias to revive Judgments, where the situation of the Parties is changed by Marriage or Bankruptcy.

It is not only necessary that the parties to the record should be alive at the time of the execution, but that they should not have altered their situation so as to have changed their legal responsibility; as in case of a *feme sole* marrying, after judgment and before execution; or of either party becoming a bankrupt.

If the parties to the suit change their situation as to legal responsibility, *sci. fa.* necessary.

1. Of the Marriage of the Party.

3.

If a judgment be recovered by a *feme sole*, and she before execution taken out, marries, the husband and wife must sue out a *sci. fa.* and get judgment thereon, *quod habebant executionem*; and if after such judgment, but before execution, the wife dies, the husband alone may have a *sci. fa.* and go on to execution. *Woodyer v. Fresham*, Sal. 116. Com. 455.

As first, by marriage.

Judgment by *feme sole*, who afterwards marries and dies.

So, *vice versa*, if judgment be recovered against a *feme sole*, and she marries, a *sci. fa.* must be sued out against the husband and wife, and judgment had against them; and if the wife then dies, a new *sci. fa.* may issue against the husband only, and he will be chargeable, though he was not liable upon the first judgment. *Carth.* 30. Sal. 116. 1 Mod. 170.

Judgment against *feme sole*, who afterwards marries and dies.

If husband and wife obtain judgment, and the wife dies, the husband without taking out administration to her, may have a *sci. fa.* *Cro. Eliz.* 844. 3 Mod. 188. 2 Leon. 14.

Judgment by baron and *feme*, and *feme* dies.

The principle in all the above cases is, that by the judgment on the *sci. fa.* it becomes a debt of the husband's.

But

Judgment by
feme sole exe-
cutrix, who af-
terwards mar-
ries and dies.

But if a *feme sole* be executrix of another, and as such executrix recovers judgment, and then marries, and a *sci. fa.* be sued out by the husband and wife, as such executrix and judgment had thereon; if the wife afterwards die, the husband cannot sue out a *sci. fa.* alone, and have execution for such debt, as his own proper debt, because the judgment does not make it such, but it belongs to the succeeding executor or administrator *de bonis non*, as assets of the original testator's estate. Cro. Car. 207, *Beaumont v. Long*.

Judgment on
plea of cover-
ture how baron
to get costs.

If an action be brought against a married woman, and she pleads her coverture, which is found for her, the husband cannot have execution for the costs without a *sci. fa.* *Wortley v. Rayner*, Doug. 637.

15.

15. Of the Bankruptcy of the Party.

Secondly, by
bankruptcy.

Another case in which a *sci. fa.* may be necessary from the party having changed his legal responsibility, is that of bankruptcy.

If plaintiff be-
come bankrupt,
how assignees
may proceed by
sci. fa. or in the
name of bank-
rupt.

If a plaintiff become bankrupt any time after the commencement of a suit, and before interlocutory or final judgment, the proceedings should be continued till judgment in the name of the bankrupt; for the assignees cannot make themselves parties in any intermediate stage of the proceedings; but immediately after judgment, even an interlocutory one, they may; so that, after interlocutory judgment, they may either sue out a *sci. fa.* in their own names against the defendant, to shew cause why a writ of inquiry should not issue, or they may continue the suit till judgment, and afterwards sue out a *sci. fa.* and take out execution, or they may proceed to judgment and execution, without any *sci. fa.* in the name of the bankrupt. The last is the best and quickest mode. *Waugh v. Austin*, 2 D. & E. 437. *Bibbins v. Mantel*, 2 Wils. 358.

When assignees
may be made
parties.

Thus where the plaintiff after judgment and a writ of error allowed became a bankrupt, his assignees cannot become parties by suing out a *sci. fa. quare executionem non* in their own names, to compel an assignment of errors. *Krétchman v. Breyer*, 1 D & E. 463.

Plaintiff

Plaintiff obtained a judgment and afterwards brought a *sci. fa.* and had judgment thereon, and then became bankrupt. The commissioners assigned the judgment to a stranger, who moved the court that it might be entered so as to entitle him to the benefit of the judgment on the *sci. fa.* without a new *sci. fa.*, and it was ruled accordingly. *Plumer v. Lee*, 5 Mod. 88.

How court will relieve the assignee of a judgment.

The assignees of a bankrupt cannot proceed by *sci. fa.* on a judgment, whilst error is depending thereon. Assignees of *Kiffin v. Leonard*, Ld. Ray. 1295.

No proceedings by *sci. fa.* pending error.

If the bankruptcy be disputed, and the assignees move the court, for money levied on an execution by a bankrupt to be brought into court, on the ground that the judgment was assigned to them as assignees, the court will detain the money till a *sci. fa.* is brought to try the bankruptcy. 2 Willf. 372.

When court will on motion detain money levied by a bankrupt.

A declaration on a *sci. fa.* by the assignees of a bankrupt, stating that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs, is sufficiently certain without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter v. Krechman*, 2 D. & E. 45.

What declaration on *sci. fa.* by assignees good.

For the manner of suing out *sci. fa.* appearing thereto, and proceeding thereon, see next sect. 5.

SECTION V.

Of the Proceedings in the Action of Scire Facias in all the above Cases.

A *sci. fa.* may issue of course at any time within seven years from the signing of the judgment.

When *sci. fa.* may issue.

If the judgment be above seven, but not ten years standing, there must be a *side bar* motion in treasury, (no

Without motion.

(no affidavit necessary,) and a rule got at clerk of rules in K. B. and secondary's in C. B. But it need not be served on defendant or his attorney.

When motion necessary.

But if the judgment be above ten years old, the plaintiff must in K. B. move the court, on an affidavit of the debt being due; the judgment unsatisfied and the defendant living, (or as the case may be,) it is a rule to shew cause. But in C. B. no such affidavit is necessary, but it is a motion of course signed by a serjeant; but then there must be a *scire feci* returned to such *sci. fa.* or an affidavit of personal notice to the defendant.

But if the judgment in C. B. be above twenty years old, there must be an affidavit and rule to shew cause as in K. B. *Coysgarne v. Fly*, 2 Blac. 995.

If after the above motion the judgment is revived, and then defendant dies before execution, the plaintiff must sue out a new *sci. fa.*, but he may have it without motion, the judgment being revived before. Sal. 598.

In K. B. two *nibils* always requisite.

In the King's Bench, and in all cases, there must be either one *sci. fa.* with a *scire feci* returned, or two *sci. fa.*'s with *nibils*. 2 Inst. 472. 2 Mod. Caf. 227.

In C. B. in certain cases, one *nihil* sufficient.

But in C. B. whenever the *sci. fa.* is to revive a judgment against the same defendant who was party and privy to the judgment, one *scire facias* is sufficient though a *nihil* be returned thereto. Dyer, 186. Sal. 599.

In other cases, two.

But not so where the defendant is not party to the record.

Of the *teste* and return in both courts.

The time, however, between the *teste* and return in both courts is in effect the same; for in C. B. the one *sci. fa.* must have fifteen days between the *teste* and return, whereas in K. B. there must be fifteen days between the *teste* of the first and the return of the second *sci. fa.* So in C. B. where two *sci. fa.*'s are necessary.

In general, no notice given on *sci. fa.*

Although the intent of the *sci. fa.* is to give the party against whom execution is about to issue, notice or warning thereof, yet by the general practice it is wholly defeated,

defeated, for the defendant may be summoned or not as the party thinks fit; and indeed the usual way is to revive the judgment without giving the party any notice.

No *alias sci. fa.* must issue till the first writ of *sci. fa.* be returnable. R. T. 8 W. 3.

Of the *alias sci. fa.* in both courts.

And in C. B. not until the appearance-day of the return of the first.

The *alias* shall bear *teste* the day of the return of the first. Sal. 599.

And in C. B. on the appearance-day of the return of the first.

If only one *sci. fa.* and a *scire feci* in K. B. such *sci. fa.* should have fifteen days between the *teste* and return.

So must every *sci. fa.* when proceedings by original; but if inclusive both of *teste* and return, it is good. Sal. 599. 2 Jones, 228.

How if proceeding by original.

And the *alias sci. fa.* by original, must be tested on the appearance-day of return of first.

If plaintiff means to proceed without giving notice to defendant, let him in K. B. sue out *sci. fa.* on a 2s. 6d. stamp parchment; get it signed and sealed; leave it at sheriff's office any time before the return thereof, R. E. 5 Geo. 2. one day before is sufficient; upon the return-day sue out an *alias*, sign and seal it, leave it at sheriff's office four days exclusive before the return thereof, R. E. 5 G. 2. They must be the last four days. 4 D. & E. 583. On the return-day of *alias*, give a rule at the clerk of the rules, on plain paper, thus, *J. B. v. C. D. rule on sci. fa.* it expires four days exclusive of the day it is given, and if the defendant does not appear, get *sci. fa.* from the sheriff's office, make entry on roll as far as sum recovered, get the roll and the two *sci. fa.*'s marked by clerk of judgments, and then sue out execution.

Of the manner of proceeding if the party is not to be summoned.

In K. B.

If

If the *sci. fa.*'s be returnable different terms, make the entry as directed *ante*, p. 117. if in K. B. and p. 118. if in C. B.

In C. B.

In C. B. ingross writ of *sci. fa.* on 2s. 6d. stamp parchment; get it signed by prothonotary and sealed. Indorse the attorney's name and place of abode thereon and the day it is sued out, with, "to be returned *nihil*." Leave it at sheriff's office, when returnable call for it, give rule at prothonotary's to appear; it is a four day rule; at expiration thereof search the book for appearance, if none to be found, make the entry on a roll, which take to prothonotary, who will sign judgment; file writ of *sci. fa.* with *custos brevium*, and sue out execution.

Of the proceeding if defendant is to be summoned.

If the plaintiff wishes to have the defendant summoned, proceed as directed *ante*, p. 116.

Of the appearance and subsequent proceedings.

So also, for the appearance to the *sci. fa.* and the declaration and subsequent proceedings, see *ante*, p. 117. and the observations to sec. 4. ch. 15.

In what court *sci. fa.* to be brought.

The *sci. fa.* must be brought in the same court where the original proceedings were, and the *testes* and returns of the writs must be as the original action was by bill or original.

What *sci. fa.* should shew when judgment was in an inferior court and removed by *certiorari*.

If the judgment of an inferior court is removed into B. R. by *certiorari*, and the party sues a *sci. fa.* to have execution upon such judgment, he ought to shew in his *sci. fa.* that it is the judgment of such an inferior court removed thither by *certiorari*, and ought to shew the particular limits of the inferior jurisdiction, and pray execution within the particular limits. But if the judgment be removed into B. R. by writ of error, and affirmed, the party may have execution in any part of England; for by the affirmance it has become the judgment of the King's Bench. But in a *sci. fa.* upon such judgment affirmed, the plaintiff ought to allege, that it was removed thither by writ of error. *Ld. Raym.* 216.

What executor, &c. can plead to *sci. fa.*

To a *sci. fa.* against an executor or administrator, he can make no other defence by way of plea than the party himself, if alive, could have done, which can only

only be a release or other matter in bar arising, *puis* *harrien continuance*. Salk. 315.

And if he omits to plead such matter, he shall not have an *audita querela*. 1 Will. 98.

But where the party has a matter which he might have pleaded to the *sci. fa.* in his discharge, and *two* *quibils* are returned, and judgment against him, the court will relieve him upon motion, without putting him to an *audita querela*. *Aliter* in case a *scire feci* be returned. Anon. Salk. 93.

How relieved on motion, if no opportunity to plead.

Formerly the method was, upon obtaining judgment by default against an *executor* or *administrator*, (which would reach only the goods of the testator or intestate,) and *nulla bona* returned to a *fi. fa.* sued out on such judgment, to issue a writ to inquire, whether the defendant had wasted any of the effects of the deceased; and if a *devastavit* was found by the inquisition, and returned thereto, then for the plaintiff to proceed by *sci. fa.* for the defendant to shew cause why the plaintiff should not have judgment *de bonis propriis*; to which *sci. fa.* the executor or administrator could appear and plead *plene administravit* [as in the case above].—But now the *fieri facias inquiry* and the *sci. fa.* are incorporated, and made out in one writ for expedition. However, this method, though much better than the old one, is seldom pursued at this day, as it does not answer to the plaintiff if the debt is but a small one, because no costs are allowed against the executor or administrator, unless they appear and plead to the *sci. fa.* and it be found against them. But the way is to bring an action of debt on the judgment, suggesting a *devastavit*.

Of proceeding against executor or administrator in cases of *devastavit*.

A *sci. fa.* on a judgment must pursue the terms of the judgment. And therefore, where an executor pleads *plene administravit* and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *sci. fa.* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment, and if it pray execution of assets generally, without confining it to that time, it cannot be supported.

Sci. fa. must follow judgment.

But court
will in certain
cases permit the
judgment to be
amended.

But if the executor receive assets between the time of the plaintiff's suing out the writ in the first action, and the judgment of *quando acciderint*, the court will permit the plaintiff to amend his judgment as to the time, by making it a judgment as of that term when he could at the soonest have entered it up, unless the defendant can shew that in point of fact some injustice will be done by it in the particular case. *Mara v. Quin*, 6 D. & E. 1.

C H A P. XVII.

Of Proceedings in Real Actions.

HAVING shewn the mode of proceeding in all common actions, and in some particular actions, as well personal as mixed; it may be useful, in the next place, to treat of the proceedings in such *real* actions as are in most general use, and in certain cases must still be resorted to. Such as

SEC. 1. *Dower.*

SEC. 2. *Partition.*

SEC. 3. *Quare Impedit.*

SEC. 4. *Right—Writ of.*

SEC. 5. *Waste.*

SECTION I.

Of Dower.

Dower is that part of the husband's estate, which ^{What.} comes to the wife after the death of the husband.

Every wife by law is entitled to be endowed of all ^{Who entitled} lands and tenements, of which her husband was seised ^{to it.} in *fee simple* at any time during coverture, or in *fee tail* general, or as heir in *special tail*, and of which any issue, which she might have had, might by possibility have been heir.

And she shall be endowed, as well of lands, &c. ^{Of what dower} where the husband had a *seisin in law*, as an *actual seisin*. ^{shall be.}
Co. Lit. 31. a.

U 2

And

And a widow shall be endowed of all her husband's lands, tenements and hereditaments, *corporeal* or *incorporeal*, unless there be a special reason to the contrary: for of a castle built for defence of the realm she shall not be endowed, nor of a common without stint—nor of a copyhold estate, unless by the custom of the manor: and then it is not called dower, but her *free bench*.

Where dower is allowable, it matters not, though the husband aliens the land during coverture; for he aliens it liable to dower.

Must be actual wife.

She must be the actual wife of the party at the time of his decease: so that, if she has been divorced *a vinculo matrimonii*, she is not entitled to dower. But if she were divorced *a mensa et toro* only, though it were for adultery, by the common law she should have her dower; yet now by stat. Westm. 2. if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled.

Widows of traitors are barred of dower, by stat. 5 & 6 Edw. 6. c. 11. (except in certain treasons relating to the coin), but not the widows of felons.

An alien widow of a subject cannot be endowed.

Of what age.

And to be entitled to dower, the wife must be above *nine years old* at the death of her husband.

To what extent.

Dower varies according to the particular custom of the place; in general it is a third, but if the lands be *gavelkind*, it is a *moiety*.

When to be assigned.

Dower ought to be assigned to the widow within forty days after her husband's death; and by law she has the privilege of staying in the capital mansion, or some house whereof she is dowable, for forty days after her husband's death, (the day of his death being accounted one,) which is called the widow's *quarantine*; during which time she is to be supplied with all necessaries at the expence of the heir; and before the end thereof, is to have her dower assigned her; and this privilege is confirmed by Magna Charta, c. 7.

A widow

A widow may prevent her dower, or forfeit the same by her own act; the first case happens, when she detains the charters of title-deeds and evidences of the estate from the heir; in which case she is not entitled to dower till she restores them. And the latter happens, when after assignment, the dowager aliens the land assigned her for dower; in which case she forfeits her dower *ipso facto*, and the heir may recover it by action by the statute of Gloucester.

How prevented
or forfeited.

There are three things requisite to entitle a person to dower, viz. marriage, seisin, and the death of the husband.

The three things
requisite.

A woman entitled to dower cannot enter till it be assigned to her, and set out either by the *heir*, *terre tenant*, or sheriff (after recovery thereof by action) in certainty. Roll. Abr. 681. Dy. 346. Plow. 549. Brook. 18. Co. Lit. 34. a. 37. a. b.

Tenancy in dower, or an action for dower, seldom happens at this day, dower being generally barred by a *jointure* (as regulated by the statute of uses, 27 Hen. 8. c. 10.) made upon preconcerted marriages, or where the estate is considerable.

Action of dower
seldom brought
now. Why.

But where it is not barred by any marriage settlement, if the heir or his guardian do not assign the widow her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it.

If the heir (being under age) or his guardian, assign more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower. Co. Lit. 34.

Of the writ of
admeasurement
of dower.

There were five kinds of dower; 1. Dower *de la plus bealle*, which was abolished with the military tenures. 2. Dower by the *common law*. 3. Dower by *particular custom*, as that the wife shall have more than a third or less, or the whole. 4. Dower *ad ostium ecclesie*. And 5. Dower *ex assensu patris*, which is only a species of the last. But the only usual species of dower at present subsisting, is dower by the common law; in treating of which we will consider

Of the different
kinds of dower.

- A. The Procefs in Dower,
- B. The Appearing, Counting, &c.
- C. The Demanding a View,
- D. The Pleadings,
- E. The Judgment both by Default and Final.

A. Of the Procefs in Dower.

Different writs
in dower.

Dower may be recovered by writ of *dower unde nil habet*, or by writ of *right of dower*. The latter is proper when the wife has already dower of part in the same ville: for then she cannot have a dower *unde nil habet*, against the same tenant. Com. Dig. tit. Dower, which is only when the whole is withholden.

Of the unde nil
habet.

The writ of dower *unde nil habet* may be sued in the Common Pleas, or in the county by *justicies*, or upon a *special custom by plaint*; but it is usually commenced in the Common Pleas.

A *præcipe* must be made out for the original writ, which is in the following form:

“ Berkshire, to wit. Command E. F. that justly, &c.
 “ he render to Ann B. widow, who was the wife of John
 “ B. her reasonable dower, which falleth to her out of
 “ the freehold which was of the said John B. heretofore
 “ her husband, in the parishes of O. P. Q. and R.
 “ whereof she nothing hath, as she says.

“ Returnable in eight days of the
 “ Purification of the Blessed
 “ Virgin Mary.”

For forms of the *original writ*, vide the books of entries, &c.

The writ was, *Command B. that he render A. her reasonable dower of lands, &c. late of C. her husband: and because the writ did not say, Command B. that he render A. wife*

A. who was the wife of C. &c. the writ was held ill.
Cro. Car. 217.

When the *original writ* is obtained, the process upon it is a *summons*, which is to be served upon the tenant or upon the land: after which, fourteen days before the return thereof, *proclamation* must be made of that summons on a Sunday, at or near the most usual door of the church or chapel of the town or parish where the lands lie; and that proclamation must be returned, together with the names of the summoners, pursuant to 31 Eliz. c. 4. for without it no *grand cape* can be awarded, but an *alias* and *pluries* summons.

Cf the sum-
mons on the
writ.

Proclamation.

The *proclamation*, by the statute 31 Eliz. ought to be made at the parish church door, though it be in another county than where the land lies. Cro. Eliz. 472.

At the return of the summons, defendant may cast *Essoign*.
an *essoign*.

If the tenant casts an *essoign*, at the return of the summons, it must be entered upon the *essoign*-day of the same return.

And if no *essoign* be then entered upon the day of exceptions, the defendant may enter a *ne recipiatur*.

The return by the sheriff is in this form :

Return of
sheriff.

“ Pledges of prosecuting { John Doe,
Richard Roe.

"I have commanded the within-named _____ and at
"the great and common door of the parish church of _____
"_____ within written, upon the Lord's day, (to wit,) _____
"on the _____ day of _____ within written, imme-
"diately after divine service and preaching ended, I
"have made public proclamation according to the form
"of the statute, and as this writ itself commands and
"requires.

"Summoners of the within-named } W. W. Esq.
"E. F. R. S. and T. W. } Sheriff."

Upon the return of the summons, if the tenant does not appear, or cast an *essoign*, or if an *essoign* is cast, and at the day given by adjournment of the *essoign*, the tenant

does not appear, the next process is the writ of *grand cape*. But then, before the *grand cape* issues, the demandant shall make her demand, for no certainty appears before the demand made. Brook. 96.

The writ of *grand cape* commands the sheriff to seize the third part of the lands, &c. demanded; or, if the same are *gavelkind*, to seize the *moiety*, &c. by the view of two honest and lawful men of the county, and to summon the *tenant*, &c.

For the form of the writ, *vide* the books.

Alias grand cape.

If the sheriff does not return the writ, an *alias grand cape* goes, at the return of the *grand cape*: and if the tenant alleges, that he was not able to come, it does not save his default. R. 3 Leon. 2.

So, if *nulla tenementa*, &c. be returned, a *testatum grand cape* issues.

If the sheriff executes the writ, the return is in this form:

Sheriff's return thereto.

" By virtue of this writ to me directed, on the
" day of January, in the year within written, I have
" taken into the hands of our lord the king, by the view
" of A. B. and C. D. honest and lawful men of my
" county, the third part of the lands and tenements
" within mentioned, with the appurtenances, as I am
" within commanded.

" Summoners of the within-named } W. W. Esq.
" E. F. R. S. and T. W. } sheriff."

Tenant waging law.

If the tenant appears, he may wage his law of *non summons*, &c. If he does not wage his law, there shall be final judgment against him. Com. Dig. 5 vol. 240.

Strictness required in making proclamation.

In dower of lands in L. M. and N. the sheriff returns pledges of prosecuting A. B. C. D. and the names of the summoners E. F. G. H. and that after the summons made, and fourteen days and more before the return of it, at the most usual church door of L. where part of the lands lay, such a Sunday after sermon ended, be publicly proclaimed

claimed, all and singular the things contained in the writ,
to be proclaimed according to the form of the statute in that
case made, and indorsed his name to the return. To which
an exception was taken, because proclamation was not
made at all the church doors; but *per Cur.* proclamation
at any one of them is sufficient; but the return was
held ill; because, he says, he had proclaimed all and
singular the things in that writ contained, without say-
ing what. Hob. 133.

Motion was made to set aside the *grand cape*, proclamation not having been made fourteen days before the return of the summons, according to the 31 of Eliz. the summons was returnable on the morrow of All Souls, and the proclamation was made the 27th October, which was but six days before the return. The court made a rule to shew cause, which was afterwards made absolute, no cause being shewn. Barnes, 1.

16. Of Appearing, Counting, &c. in Dower.

If the tenant appears upon the summons, &c. he may touch the heir to warranty.

Or if the tenant appears upon the summons, or on the adjournment of the *essoign*, or if he appears at the return of the *grand cape*, and the defendant releases the default, the demandant shall count upon her writ. Co. Ent. 271. a.

The count shall be of a third part of such a messuage, &c. for if it be of three messuages, &c. where there are several, and three is the third part of all, it is bad. Lev. 169. But *Quare*, if it cannot be amended? *Ib.*

If dower is demanded of lands of the nature of *gavelkind*, it must be of a moiety *dum sola et casta*; for if the plaintiff demands a third part, it is a good bar that the land is *gavelkind*. 1 Leon. 133.

The count must describe the lands so certain, that How lands de-
 fin may be given by the sheriff, and therefore of a scribed.
 third part of three tenements is bad. 2 Mod. 355.

Dower

Dower does not lie *de tenemento*, being too indefinite. Ld. Raym. 1384.

How parties
named therein.

If the demandant is not named, as *quæ fuit uxor B.* in the first part of the writ, it is bad; though afterwards, the lands demanded are called *terras B. quondam viri sui*. Cro. Jac. 217.

The tenant, after appearing to the *grand cape*, returnable the third return of term, obtained a rule, on motion, to shew cause why he should not have an imparlance, which, at hearing, was discharged. *Et per Cur.* In dower *unde nil habet*, or any other real action, an imparlance is not to be given: *essoigns* are a sufficient delay. Real actions are not within any of the rules of court concerning imparlances. Barnes, 2.

C.

C. Of Demanding a View in Dower.

When the demandant has counted, the tenant may demand a view of the lands demanded. Co. Ent. 177. a.

Or if dower is demanded of a rent, he may demand view of the land out of which it issues.

Who intitled to
such view.

By statute Westm. 2. 13 Edw. 1. c. 48. the tenant shall not have a view, if the husband of the demandant aliened to the tenant himself, 2 Inst. 481. 3 Lev. 169; or if the husband died seised; or if a prior writ of the demandant abated by a plea, which arose upon the view. And if the tenant demands a view when it is not allowable, the demandant may counterplead; as if the demandant's husband died seised. Clift. 299. Rast. 231. 3 Lev. 168.

The counter plea in such case, prays, that the view may be excluded. *Vide* more of the view in dower, and what pleas may be had after. Conn. Dig. 5 vol. 251. (and tit. Abatement, l. 25.)

D. Of

D. Of Pleading in Dower.

D.

There are some pleas which may be pleaded in abatement, as *ancient demesne*. That the defendant took husband pending the writ; that her husband was attainted; *non tenure*; or *non tenure* of part; that he holds jointly with A. not named.

Of the pleas in abatement.

As to pleas in bar, there are some which admit the demand, others which deny it.

Of the first sort are the pleas of *tout temps pris*, and if this is pleaded on the first day of the return of the summons, it will excuse damage. Co. Lit. 32. b.

In bar.

So the heir may plead detainment of *charters* and *tout temps pris*, &c. Raft. 224. b.; or detainment of *charters* as to parcel. Salk. 100.

Those pleas which deny the right, are *ne unques seise* *que dower*; that demandant was under age dowerable; that the husband of demandant is alive; an elopement by demandant during coverture; or a divorce *a vinculo matrimonii*; or that demandant had a jointure; or that the husband, or husband and wife, levied a fine, and demandant made no claim within *five years*; or that the husband suffered a recovery; or tenant may plead that lands were assigned for dower by the heir, &c.; that there was a demise for years before coverture, rendering rent, and pray, that demandant may be endowed of the reversion and rent; or that demandant has released her dower to the tenant of the freehold; or *ne unques accouple* in lawful matrimony: upon which plea, a writ goes to the bishop for his certificate of the marriage, and it is tried by the certificate.

Of the plea of *ne unques accouple*.

But if the marriage took place in a country where no bishop has a jurisdiction as ordinary, (as in case of a marriage in Scotland,) there the trial cannot be by the certificate of the bishop, but the fact may be tried by a jury, upon an issue joined between the parties: otherwise there would be a failure of justice. *Uderton v. Uderton*, 2 H. Blac. 159.

For

For pleas, and the replication to pleas, *vide* Com. Dig. Bac. Abr. &c.

An issue was joined upon *ne unques accouple*, &c. and a writ awarded to the bishop; he returned the evidence before him to prove the marriage, which appeared sufficient, but did not positively return, that the parties were lawfully married. Plaintiff moved for judgment upon the return, but the court refused it, allowing plaintiff to move again; giving notice of the motion, that the other side might have an opportunity of disputing the sufficiency of the return. The return was afterwards amended, and the fact certified instead of the evidence, and plaintiff had judgment. Barnes, 1.

On the plea of *ne unques accouple*, and the issue thereupon, a writ was awarded to the bishop; who certified that she was accoupled *in vero matrimonio cum predicta B. sed clandestino et quod B. & E. (demandant) tori et mensa participatione mutuo cohabitaverunt usque ad mortem predicta B.* and judgment was thereupon given for the demandant. On which, error was brought, and *inter alia* it was assigned, that there was neither day nor place of the marriage mentioned in the certificate; but the court held it not material or issuable, because the certificate from the bishop is conclusive. That the certificate is not good, because it did not answer to the words of the issue. "*Ne unques accouple in loyal matrimonio;*" for that it was a true matrimony, and that they lived together at bed and board, is but argumentative that they were *legitimo matrimonio copulati*; but the court disallowed the exception also: for *vero matrimonio*, though *clandestino copulati fuerunt*, is as good as *legitimo matrimonii*, and have all one intendment; and though it be *clandestino*, yet it doth not vitiate the marriage*: and when it is added, that *tori et mensa participatione cohabitaverunt*, &c. this proves they continued as husband and wife during his life, and therefore it is not to be questioned now. Judgment affirmed. Cro. Jac. 351. Brook, 54. Dyer, 313. Co. Lit. 33. 9 Co. 19.

The plea of *ne unques accouple in loyal matrimonio*, which is the only plea whereby the lawfulness of a mar-

* *Vide* the Marriage Act, 26 Geo. 2. c. 33. since this case.

e. l.]

age can be put in issue, is only to be pleaded in a *real* action. Therefore the *certificate* of the ordinary is not this day necessary in any personal or mixed action. *alk. 437. 1 Lev. 41.*

C. Of Judgment in Dower.

C.

1. Of Judgment by Default.

If the tenant appears and makes default in the same term, there shall be final judgment against him. *If default be of same term.* *Saund. 46.*

Or if he confesses the action, or *nil dicit*, or *non sum informatus*, there shall be judgment thereon.

But if the tenant makes *default* in another term, a *petit cape* shall issue. *2 Saund. 46.* And if he cannot give his default upon the *petit cape*, there shall be *final* judgment against him. *If in another term.*

So if the tenant pleads that the husband is alive, and the demandant, at the day for trial, is ready with her proofs, there shall be *final* judgment against the tenant if he makes default. *2 Inst. 80.*

If the demandant is not present with her proofs, there shall be a *petit cape* awarded. *Of the petit cape.*

So if the tenant makes default at the trial by jury, there shall be a *petit cape* against him; and if he does not save his default, there shall be *final* judgment against him.

So there shall be judgment by default, though the tenant is an infant. *Cro. Jac. 111.*

In dower against an infant, he made default upon the *grand cape* returned: and it was held *per tot. Cur.* that judgment shall be given upon the default; for the infant shall not have his age in dower, which being but for life, demandant may be totally defeated by his frequent defaults; though some of the books say, that if judgment be given upon the *grand cape* before appearance, *How if infant be tenant.*

ance, this is error: *secus*, if he appears by guardian, and after loseth by default; for then, if any default be in the guardian, he shall recover against him in a writ of *disceit*; but other books doubt if the infant shall not have his age in dower: however, the other seems the more reasonable opinion. Cro. Jac. 111. 392. &c. Moor, 1148. &c.

Of the operation of the *petit cape*, and what shall be error in the proceeding.

On error to reverse a judgment in dower, at the grand sessions in Wales, it appeared by the record, that the tenant appeared at the return of the summons, and day was given over; and then came by attorney, and said nothing in bar. Whereupon it was considered, that the third part of the lands aforesaid, should be taken into the hands of our lord the king; and upon day given *ad aud. judicium*, judgment was given, that the demandant do recover. The error assigned was that they ought not to have awarded a *petit cape*, because, as defendant appeared, they ought to have given judgment on the *nil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default, as the *grand cape* is before appearance, to answer the default and demand. But this was held to be no error, being only an awarding of more process than was necessary, and it was of advantage to the tenant by delaying the demandant. And, per Twysden, if erroneous, they might now give judgment upon the *nil dicit* in this court. Vent. 60. 2 Saunders 46. 50. 5 Keb. 450. &c.

In dower, the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded; and the tenant at the day in *banco* informed the court, that he was but tenant for life, and the reversion in one A. who at the day in *banco* ought to be received; and the court appointed him to plead his plea at the return of the *petit cape*, before which time his appearance seems idle. Brownl. 126.

The demandant upon judgment by default, after a *grand cape*, shall have no damages upon the inquisition found, if there was no notice of executing the writ of inquiry. 3 Lev. 409.

2. Of final Judgment, Writ of Inquiry, Seisin, &c.

The final judgment in dower is, *quod quærens recuperet seisinam de tertia parte tenementor. petit.*; or if it be of gavelkind lands, *quod recuperet seisinam de dimidio, &c.* Final judgment what.

And by the stat. of Merton, 20 Hen. 3. c. 1. *Si recuperaverit tenementa de quibus vir obiit seifitus, tenens reddat damna, viz. valorem dotis tempore mortis viri usque ad diem, quo per judicium curia, seisinam suam recuperaverit.*

And therefore after judgment for seisin, and *habere facias seisinam* awarded, if the demandant makes a suggestion upon the roll, that her husband died seised, there shall be a writ to inquire what damages. 1 Lev. 38. Clift. 302. Of the damages and writ of inquiry.

And upon return of the inquisition, there shall be judgment *quod recuperet valorem*, and her damages. Or the jury who try the issue may also inquire of the *value and damages*. Or the demandant may remit the *value and damages*, and have an *habere seisinam* immediately. Town, J. 100.

Though the statute says only, that she shall recover damages to the time of the judgment; yet if she obtain judgment by *default*, upon a writ of inquiry, the jury may give her damages to the time of the inquisition, unless she were in possession before by virtue of an execution awarded upon the judgment by default. The jury may assess damages beyond the revenue, for she may have sustained more. 1 Leon. 56.

Damages in dower, by the stat. of Merton, extends only to lands whereof the husband died seised; and therefore, if the jury do not find that he died seised, judgment for damages will be reversed. They must find too, of what estate he died seised, viz. an estate *in fee*, or *in tail*; for if the husband alien, and take back an estate for life, the wife shall recover dower, but no damages.

If the jury find the husband died seised, they must find the time when, the annual value of the land, and damages on

on account of the detention and costs; but if they find the husband was seised, but did not die so, then no costs or damages, but only the value of the land: for damages are only given by the statute of Merton, where he died seised; and the statute of Gloucester, gives costs only where the plaintiff recovers damages. 2 Saund. 33.

The reason why the jury are to find the value of the land in case the husband died seised, is, that the court may give *damages* pursuant to the statute of Merton, from the death of the husband, to the time of the judgment. And if the heir sell to J. S. and the widow recovers her dower against him, he must pay the whole *mesne profits*, from the death of the husband, though he have not himself been half the time in possession. She is entitled by the statute, and can recover only against the tenant. *Brown & Ux. v. Smith*, Hil. 25, 26 Car. 2. C. B.

Damages to be only after demand.

Damages must be after demand of dower; for the heir is not bound to assign till demanded. But unless the heir plead *tout temps prist*, he shall not take advantage of the widow's *laches* in not demanding; and though he pleads *tout temps prist*, yet she shall recover damages from the *teste* of the original, to the execution of the writ of inquiry; but if the heir assign dower, and widow accepts thereof, she loses her damages. Co. Lit. 32. *Kent and Kent*, Mich. 1733, B. R. *Yeo and Yeo*, 14 Geo. 2. B. R.

How damages lost.

Demand of infant good.

Upon a trial at bar, the issue was, if there was a demand of dower to entitle plaintiff to damages; she proved an actual demand of the heir who was an infant; and the court held that dower was demandable of the heir, though under fourteen; and that the not assigning of dower, though the infant did not refuse to do it, but was prevented by his guardian, was a refusal in law sufficient to entitle plaintiff to damages. *Corfellis v. Corfellis*, Hil. 29, 30 Car. 2. C. B.

From what time to what time damages to be given.

On execution of a writ of inquiry of damages, the jury found for damages the value of a *third* of the land, from the time of the husband's death, till the day of the inquisition, without any deduction for *reprises*, (viz. land tax, repairs, and chief rent,) and for costs, the jury gave

gave the amount of the attorney's bill for a demandant, upon his evidence that it was a reasonable bill, and that he expected it from his client. The court thought that the value of the *third* of the profits run since the death of the husband, should have been computed only to the time of awarding the writ of inquiry, and not to the day of the inquisition; that an allowance ought to have been made for *reprizes*; the words of the writ are (*ultra reprisas*); and that the attorney's bill to his client was the measure of costs. The inquisition was set aside, and a new writ ordered to be executed before a judge at the next assizes, on payment of costs. Barnes, 234. Q. If the jury ought not to have given common costs as *one shilling*, and the rest allowed as costs *de incremento* by the prothonotary? But it has been said, that if the jury give damages a *morte viri*, to the time of the inquisition, though it is after the judgment, it will be good. R. Leon. 56.

So, though they give damages beyond the value of the land.

Value or damages are only recoverable in dower, *unde nil habet*. Co. Lit. 32. b.

The writs of *seisin* and *inquiry of damages* are blended in one writ.

If dower is demanded of *lands*, or of things that may be severed, the sheriff ought to assign her the *third part* by metes and bounds: and if the sheriff does not return *seisin* by *metes and bounds*, it is ill, unless closes certain are assigned by name, or such a manor which is known and certain, in lieu of dower of other manors. Perk. 414. Rol. Abr. 682. Co. Lit. 34. Bendl. 87. But an assignment, though in a different manner by consent of the parties, may be good. Cro. El. 310. Rol. Abr. 683.

Of the assignment by sheriff on writ of *habere facias seisinam*.

If a woman be dowable in three manors, and accepts of the heir one of those manors, in lieu of dower in all the rest, this is good, though against common right, which gives her but the third part of each manor. Roll. Abr. 683.

But to a writ of *habere facias seisinam*, the sheriff cannot return that he delivered the demandant one, instead of a *third part* of the three, in recompence of her dower.

Upon the recovery of dower, and seisin awarded, the sheriff returned that he had assigned to the demandant her dower of a house, the *third part* of each chamber, and had chalked it out to her. And this return was held an idle and malicious return, and he was committed for it, as in such case, he ought to have assigned her certain chambers, or rooms thereout. Palm. 265.

The sheriff was committed, for refusing to make an equal allotment of dower, and taking 60 *l.* of demandant to execute the writ, and the court ordered an information against him for it. 1 Keb. 743.

If dower is demanded of meadow, pasture, &c. the sheriff may assign all meadow, &c. for dower. R. Mod. 12. 19.

A woman recovered dower, had a writ to the sheriff, who returned that he had delivered 84 acres to the demandant of the land mentioned in the writ. After a *sci. fa.* was brought, suggesting that 60 acres of the 84 assigned to her by the sheriff were a stranger's, not mentioned in the record, and therefore she ought to have a new division. The tenant said, that the other 24 acres were parcel of the land recovered, and that she had entered and accepted the 24 acres; and upon demurrer it was adjudged, that she was barred by the acceptance and entry into the 24 acres. Moor, pl. 167. 928. Dy. 91. *in margine.*

Dower was brought *de tertia parte* of a mill, kiln-house, &c. and judgment was to recover the *third part in separalitate per metas & bundas*. And this judgment was reversed upon error, for it ought to have been of the third part generally; for if *per metas & bundas* none can make use of it. Lev. 181. 2 Keb. 8.

How if demandant or tenant die during proceedings.

If demandant dies before writ of inquiry executed her administrator cannot bring a *sci. fa.* for the damages and *mesne profits*. Salk. 252.

So, if tenant dies after judgment and writ of *seisin* executed, the demandant cannot bring a *sci. fa.* for inquiry of damages, after the death of the tenant, against his heir or tertenants. 3 Lev. 275. 1 Sid. 188.

By 16 & 17 Car. 2. c. 8. execution shall not be stayed by writ of error, upon any judgment after *verdict*, unless plaintiff become bound to pay damages and costs in case of affirmance, or plaintiff discontinue or be nonsuit; and a writ shall issue to inquire of mesne profits, and damages by waste done after the first judgment. Stra. 971. or if error be brought.

Judgment in dower shall not be stayed by error, if plaintiff in error doth not enter into recognizances to pay damages and costs. Carth. 134.

If judgment be affirmed in *dom. proc.* and costs given, the demandant may bring an action on the recognizance for such costs, without suing out a writ of inquiry. And. 153.

SECTION II.

Partition.

- A. Of the Intent and Operation of Statute 8 & 9 W. 3. c. 31.
- B. Of the Process by Writ of Partition.
- C. Of the Declaration in Partition.
- D. Of the Pleadings in Partition.
- E. Of the first Judgment in Partition: And herein, of the Writ *de Partitione faciendâ*, &c.
- F. Of the second or final Judgment in Partition.

3. 2. Of the Intent and Operation of the Statute
8 & 9 W. 3.

Of the intent
and operation
of the statute
8 & 9 W. 3.

By the common law, *joint tenants* might agree to make partition of the lands, but one of them could not *compel* the others so to do; for as such estate is originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. Whereas by the common law, *coparceners* were compellable to make partition, if any one of them chose to sue out a *writ of partition*. But now by the statutes 31 Hen. 8. c. 1. and 32 Hen. 8. c. 32. *joint tenants*, and *tenants in common*, as well as *coparceners*, are compellable by *writ of partition* to divide their lands; and the statute of 8 & 9 W. 3. has only provided an easier method of carrying on the proceedings by the *writ of partition*, than was used at the *common law*.

By the statute 8 & 9 W. 3. c. 31. which is intitled, "An act for the easier obtaining partition of lands in coparcenary, joint-tenancy, and tenancy in common;" after reciting, that "Whereas the proceedings upon writs of partition between coparceners by the common law or custom, joint-tenants, and tenants in common, are found by experience to be tedious, chargeable, and oftentimes ineffectual, by reason of the difficulty of discovering the persons and estates of the tenants of the manors, messuages, lands, tenements, and hereditaments, to be divided, and the defective or dilatory executing and returning of the process of summons, attachment, and distress, and other impediments in making and establishing of partitions, by reason of which divers persons having undivided parts, or purparts, are greatly oppressed and prejudiced, and the premises are frequently wasted and destroyed, or lie uncultivated and unmanured, so that the profits of the same are totally, or in a great measure lost; for remedy whereof, it is enacted, That after process of *pone*, or attachment returned upon a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant or tenants to the action, and a

New proceedings under the statute.

"copy

"copy thereof left with the occupier, or tenant or
 "tenants; or, if they cannot be found, to the wife, son,
 "or daughter (being of the age of one and twenty
 "years or upwards) of the tenant or tenants, or to the
 "tenant in actual possession, by virtue of any estate
 "of freehold, or for term of years, or uncertain in-
 "terest, or at will, of the manors, lands, tenements, or
 "hereditaments, whereof the partition is demanded
 "(unless the said tenant in actual possession be de-
 "manded in the action) at least forty days before the
 "day of the return of the said *pone* or attachment; if
 "the tenant or tenants to such writ, or any of them,
 "or the true tenant of the messuages, lands, tenements,
 "and hereditaments as aforesaid, shall not, in such case,
 "*within fifteen days after return of such writ of pone or*
 "*attachment*, cause an appearance to be entered in such
 "court where such writ of *pone* or attachment shall be
 "returnable; then, in default of such appearance, the
 "demandant having entered his declaration, the court
 "may proceed to examine the demandant's title, and
 "quantity of his part and purpart; and accordingly as
 "they shall find his right, part and purpart to be, they
 "shall for so much give judgment by default, and
 "award a writ to make partition, whereby such pro-
 "portion, part and purpart, may be set out severally:
 "which writ being executed *after eight days notice to the*
 "*occupier, or tenant or tenants of the premises*, and re-
 "turned, and thereupon final judgment entered, the
 "same shall be good, and conclude all persons what-
 "soever, after notice as aforesaid, whatever right or
 "title they have, or may at any time claim to have, in
 "any of the manors, &c. mentioned in the said judg-
 "ment and writ of partition, although all persons con-
 "cerned are not named in any of the proceedings, nor
 "the title of the tenants truly set forth."

Of the affidavit
of notice of
writ of parti-
tion.

Of the time of
appearance.

Proceedings in
default thereof.

Of examining
demandant's
title;

and rectifying
writ accord-
ingly.

By *sect. 2.* Provided, that if such tenant or other shall
 in one year after judgment entered, or in case of in-
 fancy, coverture, non-sanity, or absence, within a year
 after such inability determined, shew a good matter in
 bar of such partition, &c. the court may set aside such
 judgment; but if the same is confirmed, the party ap-
 pealing pays costs.

By *sect. 3.* No plea in *abatement* shall be admitted or received in any suit of partition, nor shall the same be abated by reason of the death of any tenant.

By *sect. 4.* If the *high sheriff* cannot be present at the execution of the judgment in partition, the under-sheriff, in the presence of two justices, may proceed therein—And in case such partition be made, returned, and filed, the tenants, before division, are to remain tenants, under the same conditions, and the landlords, &c. are to make good to their tenants the said parts as before partition made.

By *sect. 5.* The sheriffs, under-sheriffs, &c. are to give due attendance to the execution of the writ of partition, and in case the demandant does not pay the fees to the sheriff, &c. then the court shall award them, &c.

The above act was made perpetual by the 3 & 4 Ann. c. 18. sec. 2.

B.

B. Of the Writ of Partition, &c.

Writ how sued out.

Since the above statute, *partition* has been usually made by *writ*; before which statute it was done either by *writ*, *commission*, or *consent*, and was in many cases liable to be defeated.

By the statute 31 Hen. 8. c. 1. *joint-tenants*, and *tenants in common*, or in right of their wives, are compellable by *writ* to make partition.

To proceed to make *partition*, according to this statute, the demandant or demandants apply to the court of Chancery, and sue out an *original writ*, which is to this effect:

Form thereof.

“GEORGE the Third, by the grace of God, of
“Great Britain, France and Ireland king, defender of
“the faith, and so forth. To the sheriff of
“greeting: If A. B. and C. D. shall give you security,
“that their suit shall be prosecuted; then summon, by
“good summoners, E. F. that he before our justices at
“Westminster, on the morrow of All Souls, to shew
“wherefore,

_____”

Summons
thereon.

therefore,

**Affidavit ac-
cording to
statute.**

21016,

" Lord 1795, deliver to and leave with P. Q. R. S. T. V.
 " &c. the occupiers of the messuages, lands, and tene-
 " ments, in the said writ mentioned, a true copy of
 " the same writ.
 " Sworn," &c.

Of the pone on
 default of ap-
 pearance.

Upon default of appearance in court, the *demandant* should sue out a *pone* or attachment, which is to this effect :

" *GEORGE* the Third, &c. To the sheriff of
 " greeting: Put by sureties and safe pledges E. F. of
 " that he be before the justices at Westmin-
 " ster in eight days of St. Hilary, to answer A. B. and
 " C. D. wherefore the said A. B. C. D. and E. F. hold
 " together and undivided *the manor of* *with the*
 " *appurtenances, &c.* [as in the writ], of which the said
 " E. F. denieth partition to be made between them,
 " according to the form of the statute in such case made
 " and provided, and unjustly permitteth not the same
 " to be done; and to shew wherefore he was not in
 " our court before our justices at Westminster, on the
 " morrow of All Souls last past, as he was summoned;
 " and have there the names of the pledges and this
 " writ.

" Witness," &c.

How served.

This writ should be served in the same manner as the writ of partition was, and the parties should be informed of the contents.

How tested.

The *pone* should bear teste on the *quarto die post* of the return day of the writ of partition, and there must be fifteen days between the teste and return of it at least; and by the statute of 8 & 9 W. 3. *ante*, there must be at least *forty days* between the service of the writ of partition, and the return of the *pone* or attachment.

Time of service.

C.

C. Of the Appearance and Declaration.

Appearance
 when to be
 entered.

If the tenant does not within *fifteen days* after the return of the *pone* or attachment cause an appearance to be entered, the *demandant* may enter his declaration, and

and the court will proceed to examine his title; and if they find the right with the demandant, there shall be judgment by default for so much, and a writ awarded to the sheriff to make partition.

Or if the defendant appears, the plaintiff must declare. The declaration is in the following form: Of the declaration.

" ——— to wit, E. F. of _____ in the county _____
aforesaid, was summoned to answer A. B. and C. D. of a plea, wherefore, whereas the said A. B. C. D. and the said E. F. hold together and undivided the manor of _____ with the appurtenances, &c. [specify the premises according to the writ], of which the said E. F. denieth partition to be made between them according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the statute: And whereupon the said A. B. and C. D. by their attorney, say, that whereas they and the said E. F. hold together and undivided the tenements aforesaid, with the appurtenances, whereof it belongs to the said A. B. and C. D. and their heirs, to have one moiety of the tenements aforesaid, with the appurtenances, to hold them in severalty, so that the said A. B. and C. D. of their moiety belonging to them of the tenements aforesaid, with the appurtenances; and the said E. F. of his moiety belonging to him of the tenements aforesaid, with the appurtenances; may severally apportion themselves: he the said E. F. denieth partition thereof to be made between them according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the said statute; whereupon they say, that they are injured, and have damage to the value of one hundred pounds. And therefore they bring suit," &c. Form thereof.

The declaration by one *parcener* or *joint-tenant* against the others, must shew how they are joint-tenants. Cro. What it must shew.
El. 64.

But not where they are *tenants in common*, for they claim by several titles, and one is not confusant of the other's title. R. Cro. El. 64.

So,

So, if they are parceners, a declaration which shews that it was the inheritance of the common ancestor in *tail*, is sufficient, without shewing how the estate tail is commenced. Dy. 79. b.

But if the declaration says that the plaintiff and defendant were seised in fee, where it is found that the defendant has only in tail, the writ abates. R. Cro. El. 760.

D.

D. Of pleading in Partition.

No plea in abatement.

To the declaration there can be no plea in *abatement*, since the stat. 8 & 9 W. 3. c. 31. s. 3. Nor shall the writ abate by the death of defendant. *Ibid.*

What pleadable in bar.

And if he pleads in *bar*, he can plead no other plea than *non tenent insimul*, for every other plea in bar is *tantamount* to *non tenent insimul*.

Upon which plea issue may be taken, and the parties proceed to trial as in other cases.

Of confessing the action.

But the party may confess the action, and consent that partition may be made.

Of the damages.

In a writ of partition no *damages* shall be recovered, nor an inquiry of them, Noy, 68. 143. ; for it is a real action.

Of examining the title of demandant according to stat.

Process having been duly returned, declaration entered, and no appearance entered by the tenant *within fifteen days*, pursuant to the statute 8 & 9 W. 3. the court on motion granted a rule to shew cause, which was afterwards made absolute, for the court to proceed to examine the title of the demandant, according to the statute. On the morrow the title was examined, and no counsel appearing for the tenant, judgment on default was given for the demandant to hold in severalty the premises demanded in his count, in some of which he was seised of two undivided third parts; and in others of a moiety only with the *tenant*, the Earl of Thanet. And a writ of partition was awarded accordingly.

Sec. II.]

ingly. Upon the return of the writ, the sheriff returned that he had executed the same in the presence of persons who attended for plaintiff and defendant respectively; and he specified in his return the several parcels, with their metes and boundaries; and then plaintiff moved for final judgment, *quod partitio sit stabilis*. And afterwards the writ was made absolute, on affidavit of notice to the defendant and tenants in possession. *Halton v. Earl of Thanet*, 2 Blackf. Rep. 1134. 1159.

§. Of the first Judgment in Partition, and of the Writ *de Partitione faciendâ*.

C.

In partition there are two judgments; the first *quod partitio fiat*; the second *quod partitio firma & stabilis in perpetuum teneatur*. Two judgments in partition.

After confession of the action or issue tried for the plaintiff, there shall be judgment *quod partitio fiat*. *Co. Lit.* 167. b. What.

And thereon a writ shall issue to the sheriff to make partition.

The first judgment *quod partitio fiat* is in the following form:

“ Therefore it is considered, that partition be made thereof between them, &c. And it is commanded to the sheriff, that in his proper person he go to the manor and tenements aforesaid, and in the presence of the parties aforesaid, being forewarned, if the shall be willing, the manor and tenements aforesaid, with the appurtenances, by the oath of good and lawful men of his county, respect being had to the true value of the manors and tenements aforesaid, with the appurtenances, he cause to be divided into *two equal parts*, (or as the case is,) and one part of those parts he cause to be delivered and assigned to the said A. B. and C. D. and the other part thereof to the said E. F. to be holden to them and their heirs in severalty, so that neither the said A. B. and C. D. nor the said E. F. may have more of the manor and tenements aforesaid, with the appurtenances, than it
“ belongeth

Form of the first judgment.

“ belongeth to them to have ; and that the said A. B.
 “ and C. D. of their part to them thereof belonging,
 “ and the said E. F. of his part to him thereof belong-
 “ ing, may severally apportion themselves ; and that
 “ that portion, by the said sheriff so distinctly and
 “ openly made, he have here from the day of Easter
 “ in fifteen days, under his seal and the seals of
 “ those,” &c.

No error lies
 thereon.

Error does not lie on the judgment *quod partitio fiat*, nor is the record removed by it ; because the writ of error comes too soon, and error does not lie till the final judgment *quod partitio firma & stabilis*, &c. 3 Salk. 145.

Upon the foregoing judgment, the demandant shall have a writ *de partitione faciendâ*, which is to the following effect :

Form of writ
 de partitione
 faciendâ.

“ GEORGE the Third, by the grace of God of
 “ Great Britain, France, and Ireland king, defender of
 “ the faith, and so forth. To the sheriff of
 “ greeting. Whereas E. F. late of in your
 “ county, esquire, was summoned to be in our court,
 “ before our justices at Westminster, to answer A. B.
 “ and C. D. of a plea wherefore the said A. B. and
 “ C. D. and the said E. F. hold together and undivided
 “ the manor of with the appurtenances [specify
 “ the premises according to the declaration], and the
 “ said E. F. denied partition thereof to be made be-
 “ tween them, according to the form of the statute in
 “ such case made and provided, and unjustly permitted not
 “ the same to be done, and contrary to the form of the
 “ statute, as they said ; and the said E. F. appearing in
 “ our said court, freely consented that partition thereof
 “ might be made* : Whereupon it was considered in
 “ our same court, before our justices at Westminster,
 “ that partition should be made between them of the
 “ manor and tenements aforesaid, with the appurte-
 “ nances. Therefore we command you, that taking
 “ with you twelve free and lawful men of the neigh-

* If there was judgment by default, and the plaintiff declared and proceeded according to the statute, it should so be stated in this writ.— So if defendant pleaded *non tenent insimul*, and there was a verdict against him.

“ borough

"bourhood of aforesaid, by whom the truth of
 "the matters may be better known, in your proper per-
 "son you go to the manor and tenements aforesaid,
 "with the appurtenances. And there, in the pre-
 "sence of the parties aforesaid, by you to be fore-
 "warned, if they shall be willing to be present, the
 "same manor and tenements with the appurtenances,
 "by the oath of the said twelve free and lawful men,
 "respect being had to the true value of the manor and
 "tenements aforesaid, with the appurtenances, you
 "cause to be divided into *two equal parts*, and one
 "part of those parts to be delivered and assigned to the
 "said A. B. and C. D. and the other part thereof to
 "the said E. F. to be holden to them and their heirs in
 "severalty, so that neither the said A. B. and C. D.
 "and the said E. F. may have more of the manor and
 "tenements aforesaid, with the appurtenances, than it
 "belongs to them to have: and that the said A. B. and
 "C. D. of their part to them thereof belonging, and
 "the said E. F. of his part thereof to him belonging,
 "may severally apportion themselves. And that that
 "partition by you so distinctly and openly made, you
 "have here from the day of Easter in fifteen days, un-
 "der your seal and the seals of those by whose oath you
 "shall have made that partition: And have you there
 "the names of those by whose oath you shall have
 "made the same partition, and this writ. Witness
 "Sir William de Grey, knight, at Westminster, the
 " day of in the thirty-sixth year of our
 "reign," &c.

Upon this writ, the sheriff ought to give notice to the
 parties of executing the same, and he ought to attend
 in person. But by the stat. of Will. 3. *ante*, the under-
 sheriff, or one who officiates as under-sheriff, may exe-
 cute the same in the presence of two justices.

Proceeding
 thereon by the
 riff.

If the manor to be divided lies intermixed with other
 lands, so that the jury do not know the limits, quantity,
 &c. of the tenements to be divided, and the owner of
 the intermixt lands, &c. will not shew the certainty of
 his lands, yet the jury ought to make partition as well
 as they can. Dy. 266. a.

After

How returned.

After the partition made, it must be returned to the court under the seals of the sheriff and the twelve jurors. Lit. sect. 249.

The return of the above writ.

Form of return.

“ At which day here comes as well the said A. R.
 “ and C. D. as the said E. F. by their attornies afore-
 “ said. And the sheriff, namely, John Thomas esquire,
 “ now here returns a certain partition between the par-
 “ ties aforesaid, of the tenements aforesaid, by the said
 “ sheriff, by virtue of the aforesaid writ, and according
 “ to the form thereof, by the oath of twelve free and
 “ lawful men of the neighbourhood of afore-
 “ said made: which follows in these words, to wit,
 “ to wit, I, John Thomas esq. sheriff of the
 “ county aforesaid, humbly certify and return to his
 “ majesty's justices, at the day and place in the writ
 “ hereunto annexed mentioned, that by virtue of the
 “ said writ to me directed, on the day of
 “ in the twentieth year of the reign of king
 “ George the Third, of Great Britain, France, and
 “ Ireland king, defender of the faith, and so forth,
 “ and in the year of our Lord 1780, having taken with
 “ me O. P. Q. R. S. T. &c. twelve free and lawful
 “ men of my bailiwick, and of the neighbourhood in
 “ the said writ mentioned, by whom the truth of the
 “ matter may the better be known, in my proper per-
 “ son did go to the manor and tenements in the said
 “ writ specified; and there, by the oath of the said
 “ jurors, in the presence of the parties in the said writ
 “ named, by me forewarned according to the command
 “ of the said writ, and by their assent, the said manor
 “ and tenements, with their appurtenances (respect
 “ being had to the true value of the same), I did cause
 “ to be divided into two equal parts, and one part
 “ thereof, that is to say, all those two messuages, two
 “ barns, and the land thereto belonging, called the
 “ containing two hundred and twenty acres, two roads, and
 “ seven perches, more or less, late in the occupation of Wil-
 “ liam Jones, and now of Michael Dixon and his assigns,
 “ and all that messuage, &c. [specifying in like manner
 “ the whole apportionment allotted to the demand-
 “ ants]; and all commons, common of pasture, woods,
 “ under-

under-woods, and trees, ways, waters, easements and appurtenances to the said several messuages, cottages, farms, lands, wood, ground, and premises belonging or appertaining, or therewith used and enjoyed; all which said premises are situate, lying, and being in in my said county; and did cause to be delivered and assigned to the said A. B. and C. D. in the said writ named; and the other part thereof, that is to say, all the manor of in the said county of with the court baron of the same; and all rights, royalties, members, and appurtenances thereof; and all that barn, farm, and lands, &c. &c. [specifying the whole apportionment allotted to the defendant]. All which said messuages, cottages, farms, barns, lands, woods, grounds, and premises are situate, lying, and being in the parish of in my county, I did cause to be delivered and assigned to the said E. F. esq. in the said writ named, to be holden to them and their heirs in severalty, as by the said writ I am commanded; so that neither the said A. B. and C. D. nor the said E. F. might have more of the manor and tenements aforesaid, with the appurtenances, than it belonged to them to have; and that the said A. B. and C. D. of their part to them thereof belonging, and the said E. F. of his part to him thereof belonging, may severally apportion themselves.

"In witness whereof, as well I the said sheriff, as the jurors aforesaid, to this indented partition, have set our seals the day and year and place above mentioned.

John Thomas esq. Sheriff."

f. Of the final Judgment in Partition.

f.

Upon the foregoing return to the writ *de partitione faciendâ*, the final judgment of the court is, "Therefore it is considered, that the aforesaid partition be holden firm and effectual for ever," &c. And therefore this judgment, when made by writ after the appearance of the party, shall not be defeated, Co. Lit. 168. b. 171. a.; even though made against a *feme covert*,

Form of final judgment.

~~Effect~~ thereof.

vert, *ibid.*; or though not equal, *ibid.*; or though not equal, and any one of the parties be an infant. *Ibid.*

And so by the statute 8 & 9 W. 3. c. 31. If made without the appearance of the tenant, if he does not appear within fifteen days after the return of the attachment, where an affidavit was made of notice to the tenant *forty days* before the return of the writ, and a copy of it left with the occupier of the land.

But by the same statute, if judgment be in a writ of partition, without the appearance of the defendant, upon motion shewing a probable bar, or that the demandant hath not title to so much, within a year after judgment, or (if the party was an infant, covert, non-sane, or out of the realm after the inability is removed) the court may order the defendant to plead, &c.

Or if the demandant's title be admitted, but the partition appears unequal, the court may award a new *partition*.

SECTION III.

Of the Proceedings in Quare Impedit.

A *quare impedit* is a possessory action, and is now the only one used in case of the disturbance of patronage to a church or ecclesiastical benefice. The assize of *darrein presentment* which lies only for disturbance, where a man has an advowson by descent, from his ancestors having fallen into disuse, as the writ of *quare impedit* is equally remedial, whether a man claims title by *descent* or *purchase*. 3 Blac. Com. 246.

If the right of nomination be in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. The *King v. Marquis of Stafford*. 3 D. & E. 646.

In treating of these proceedings we will consider—

1. The Writ of *Quare Impedit* and Appearance thereto.

2. The Declaring in *Quare Impedit*.

3. The Pleading in *Quare Impedit*.

4. The Verdict, Enquiry, &c.

5. The Judgment in *Quare Impedit*.

1. Of the Writ of *Quare Impedit*, and Appearance thereto, &c.

2.

A *quare impedit* must be brought in the Common Pleas by all except the king, who may bring it in B. R. or C. B. F. N. B. 32. e. Where brought.

In order to bring a *quare impedit*, the party applies to the *curfitor* for an *original writ* out of Chancery, which is to this effect:

“GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, &c. To the sheriff of Command Thomas, bishop of that justly and without delay they permit A. B. to present a fit person to the church of said county, which is void, and in the gift of the said A. as he saith, and whereof he complaineth, that the said bishop and C. D. unjustly hinder him; and unless they shall so do, and the said A. shall give you security that his suit shall be prosecuted, then summon by good summoners the said bishop and C. D. that they be before our justices at Westminster, from * , to shew wherefore they will not do it, and have you there the summoners and this writ. Form of writ.

“Witness ourself at Westminster, the day of in the thirty-sixth year of our reign.

— — ”

* Must have at least fifteen days between the teste and return.

The sheriff's warrant thereon.

Warrant there-
on

“ ——— to wit. John Williams esq. sheriff of
 “ the county aforesaid, to O. P. Q. R. &c. jointly
 “ and severally, by virtue of his majesty's writ to me
 “ directed, I command you, that you or some or one
 “ of you command Thomas, bishop of ——— and
 “ C. D. esq. that justly and without delay they permit
 “ A. B. to present a fit person to the church of
 “ which is void, and in the gift of the said A. as he
 “ saith, and whereof he complaineth that the said
 “ bishop and C. D. unjustly hinder him; and unless
 “ they shall so do, and the said A. shall give you secu-
 “ rity that his suit shall be prosecuted, then summon
 “ by good summoners the said bishop and C. D. that
 “ they be before his majesty's justices at Westminster,
 “ from ——— to shew wherefore they will not do it.
 “ And that you return the same to me, so that I may
 “ have there the summoners and this precept. Given,
 “ &c. at, &c. in, &c.

“ By the same sheriff.”

Of the sum-
mons.

By the stat. of Marlbridge, 52 Hen. 3. the sheriffs
 ought to make summons by good summoners, and re-
 turn their names upon the original. 1 Brownl. 158.

And the summons ought to be served on the defend-
 ant, or at the church door. *Ibid.* 2 Mod. 265.

Of the *essoign*.

The defendants may have the common *essoign*, or *de malo lecti*, 2 Inst. 124.; but no other *essoign*. 2 Inst. 125. 1 Brownl. 160.

And if the defendants *essoign*, the plaintiff ought to
 adjourn it for fifteen days, otherwise he shall be non-
 suited. 1 Brownl. 159. Dal. 81.

How if no ap-
pearance nor
essoign.

Upon default of appearance, and no *essoign*, the plain-
 tiff shall have an *attachment*, and afterwards a *distringas*.
 2 Inst. 124. 1 Brownl. 128.

And by the *common law* the process to compel an
 appearance was by distress infinite. *Ibid.*

But

But now by the statute of Marlbridge, if the defendant does not appear, nor cast an *essoign* on the first distress, or before, there shall be judgment for the plaintiff, and a writ * to the bishop. 2 Hen. 4. 1. b. 2 Inst. 124. 1 Brownl. 158. Dy. 353. b.

But if the party be not actually summoned, there shall not be judgment upon default at the distress. 1 Mod. 248. 2 Mod. 264.

By the common law, and now by the stat. art. sup. chart. 15. in summonses and attachments, there ought to be fifteen days exclusive between the *teste* and return at least. 2 Inst. 567. Of the teste of summons, &c.

And by the stat. of Marlbridge, in *quare impedit*, or *darrien presentment*, there ought to be only fifteen or twenty-one days before the return.

And the summons ought to be *tested* the same day it issues, that there may be no prejudice in respect of *lapse*. Reg. 30. a. Bro. Qu. Imp. 151.

If the injury done to the plaintiff, or the delay arises from the bishop alone, as upon pretence of incapacity or the like, then he only is named in the writ. Who to be named in the writ.

But if there be another presentation set up, then the pretended patron and his clerk are also joined in the action.

Or it may be brought against the pretended patron and his clerk, leaving out the bishop.

Or against the patron only.

But it is generally brought against all three; for if the bishop be left out, and the suit is not determined till six months are past, the bishop is entitled to present by *lapse*; but if he is named, and is made a party to the suit, no *lapse* can possibly accrue till the right is determined; and therefore it is always most advisable to make him a party. Cro. Jac. 93.

* i. e. A writ *ad admittendum clericum*; but then, before such writ, there must be a writ of inquiry to inquire of four points, which *vide post*. 320.

If the *patron* is left out, and the writ is only brought against the bishop and the clerk, the suit is of no effect, and the writ shall abate. Hob. 316. For the right of the *patron* is the principal question in the cause. 7 Rep. 25.

And if the clerk is left out, and has received institution before the action brought (as is sometimes the case), the *patron* plaintiff, by his suit, may recover the right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it: for which reasons, it is the safer way to insert them all three in the writ.

Of the writ of
the *admittas*.

If the clerk of the *pseudo* patron has not been instituted, or if the plaintiff suspects that the bishop will admit the defendant's, or any other clerk, pending the suit, he may, immediately upon suing out the writ of *quare impedit*, sue out also a prohibitory writ, called a *ne admittas*; which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever, till such contention be determined. The writ of *ne admittas* is to this effect:

Form thereof.

“GEORGE the Third, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth: To the reverend father in God, Thomas, by divine providence bishop of greeting. We prohibit you, that you admit a person to the church of _____ which is void, as it is said, and concerning the advowson whereof an action is commenced in our court of the Bench, between A. B. esq. and you and C. D. esq. until it shall be discussed in the said court, Whether the said advowson belongeth to the said A. or to you and the said C. Witness ourself at Westminster, the _____ day of _____ the thirty-sixth year of our reign,” &c.

The effect
thereof.

If the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a *jure patronatus**, then the plaintiff

* A *jure patronatus* is a commission from the bishop, which he is bound to issue if requested by either of the contending patrons, or the clerk.

after he has obtained judgment in the *quare impedit*, may remove the incumbent, if the clerk of a stranger, by writ of *sci. fa.* 2 Sid. 94. and shall have a special action against the bishop, called a *quare incumbavit*, to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church by instituting the clerk, pending the suit, and after the *ne admittas* received *.

Jure patronatus
what.

If one defendant should appear before the others, the plaintiff may declare against him *simul cum*, &c. 1 Brownl. 159.

If one defend-
ant appear be-
fore another.

Summons and severance lies if one plaintiff will not sue. 1 Brownl. 158.

And if the writ abates, it may be brought by *journies accumps.* Ibid.

The writ may be general, and the count thereon special. F. N. B. 33. a. 5 Co. 102. b. 10 Co. 135.

B. Of Declaring in *Quare Impedit*.

B.

Quare impedit being a possessory action, cannot be maintained without a possession; for which reason the plaintiff must always declare upon a *presentation* made by himself, or his ancestor, as one whose estate he hath, or by the grantee of the next avoidance, or by his lessee for life or years.

How plaintiff
must declare.

And the plaintiff in his declaration must shew a *title* to present.

And if he claims a right to present against common right, he must shew the commencement of it; as if he alleges presentations by turns he must shew how this

What title must
be shewn.

clerks, directed usually to his chancellor, and others of competent learning, who are to summon a jury of six clergymen, and six laymen, to inquire into and examine who is the rightful patron. 1 Burn, 16, 17.

* But if the bishop has incumbered the church by instituting a clerk before the *ne admittas* issued, *quare incumbavit* lies: for the bishop hath no legal notice, till the writ of *ne admittas* is served upon him.

Y 3

commenced,

commenced, by prescription, composition, or otherwise. Dy. 299. 3 Leon. 163.

And the plaintiff must shew a title in him before the avoidance. Dyer, 129. b. Bend. pl. 79.

And if there are several plaintiffs, and they vary in title, the writ abates. R. Mod. 184.

The plaintiff ought also to allege a presentment by himself or his ancestor, or some other under whom he claims. Vaug. 7. 17. 57. But though it is generally necessary to allege a presentment, the want thereof will be cured by a verdict. Stra. 1006.

In a *quare impedit* for a united church, the patron ought to shew a presentation either to the united church, or to one of the old churches. Ld. Raym. 201. 202.

A purchaser may allege a presentment by the vender. 2 Inst. 356.

And if the plaintiff alleges a presentment without a precedent title, he must say it was *tempore pacis*. 1 Mod. 230.

But he need not, if a precedent title is alleged. R. 1 Mod. 230.

And if a presentment be alleged by a common person, he must say, that the clerk was thereon instituted and inducted. Bend. pl. 297.

The last presentment regularly shall be mentioned; and therefore if the bishop presents by *lapse*, upon the next avoidance the patron in *quare impedit* shall make mention of that. 3 Leon. 18. Dal. 75.

And the plaintiff ought also to allege a disturbance.

How if suit be
by executor.

And if the suit be by an executor or administrator, upon an avoidance in the life of the testator, an allegation of the disturbance in the life of the testator is sufficient. R. Sav. 95. Lutw. 2.

C. Of

C. Of Pleading and Proceeding at the Trial.

C.

The pleading in this action is very difficult, by reason of the variety and uncertainty of the rules concerning it. And therefore Lord Hobart advises plaintiffs in *quare impedit* to name no more defendants than needs must be; and particularly the *bishop* not to be named, if an incumbent be instituted before the *quare impedit* brought; for then the bishop can do no more hurt to the plaintiff, for he can but institute pending the *quare impedit*. 2dly, Not to name more disturbers than such as are like to have reasonable titles; for every disturber may make several titles, or confess and avoid the plaintiff's title, and if any pass against him he is barred. Hob. 320.

Pleadings in *quare impedit* intricate.

To a declaration in *quare impedit* the defendants may imparl, and afterwards may either join or plead severally. Bro. Q. Imp. 137. 165.

Of imparling.

And they may plead in abatement, or to the action. But the ordinary cannot plead in *abatement*, or cast an *essoign*, without making himself a disturber. Hob. 200.

Of pleading in abatement.

Every defendant may plead the *general issue*, which is *ne disturba pas*; because the plea doth not defend the wrong wherewith he stands charged, and leaves the plaintiff's title not only uncontroverted, but in effect confessed; and the plaintiff may upon that plea presently pray a writ to the *bishop*, or at his choice maintain the disturbance for damages. Hob. 162. Vaugh. 58.

Of pleading in bar.

But the *bishop* generally, when made a party to the suit, to shew that he is not a disturber, pleads in bar of the action, that he claims nothing but as *ordinary*. Hob. 198. Keil. 43. a. Co. Ent. 498. d. 38 Ed. 3. 2.

Of the plea by bishop;

He must disclaim, or admit himself a disturber. Hob. 320. And if he refuses a clerk, without cause, he is a disturber. 1 Leon. 230.

Upon such plea by the *bishop*, the plaintiff may have judgment against him with a writ but a *cesset executio*, till

and judgment against him.

till the other pleas are determined. Hob. 320. Vaugh. 6. Keil. 43. But if a *cesset executio* is not entered, it is only form. 1 Rol. 363. But if there be not a *cesset executio*, it is error, if execution be before the other pleas are determined. *Ibid.*

Of plea by clerk
of pseudo pa-
tron.

If the *clerk* of the *pseudo patron* has been instituted, he generally pleads, that he claims nothing but as *persona impersonata ex presentatione* of such a one. Or he may plead *plenarty* of the plaintiff, or a stranger; and by the common law, *plenarty*, before the writ for any time, was a good plea. 2 Inst. 360.

Of plea of ple-
narty.

But now by the stat. Westm. 2. c. 5. it must be *plenarty* for *six months* before the action brought to be a sufficient bar of the plaintiff's action, to recover the presentation, if the plaintiff prevails.

In pleading *plenarty*, for *six months*, by the presentment, either of the plaintiff himself, or by collation, or by lapse by the ordinary, the incumbent need not make title. Noy, 30. But where he pleads the presentment of a stranger, he ought to shew title. But *plenarty*, even for *six months*, is no plea against the king, according to the rule *nullum tempus occurrit regi*. 2 Inst. 361.

Of plea by de-
fendant patron.

The *defendant patron*, if he does not rely on the *general issue*, or plead a release, must set up a title, and traverse the *plaintiff's*; but if he shews a title, subsequent to the plaintiff's, he need not traverse the plaintiff's title, for then he confesses and avoids it.

In replying to the defendant's plea and title, it is not sufficient for the plaintiff to destroy that title, without maintaining his own title. Vaugh. 60.

Of subsequent
proceedings,

The contending parties go on to *issue* or *demurrer*, and the proceedings therein are the same as in other cases; but in this action the plaintiff must recover upon the strength of his own right, and not by the weakness of the defendant's. Vaugh. 7, 8.

How title must
be proved on
trial.

Upon the trial the plaintiff is put to make out his own title; and upon failure thereof, the defendant is put

put upon the proof of his, in order to obtain the judgment for himself, if needful.

If upon the trial the right be found for the plaintiff, the jury are to inquire of *four things*. — 1. Whether the church is full. 2. Of whose presentation; for if it be of the defendant's presentation, his clerk is removeable, if made a party to the suit, and the plaintiff commenced his action in due time, *i. e. infra tempus semestre*, by writ. 3. In case of plenarty upon an usurpation, whether *six calendar months* have passed between the avoidance and the time of bringing the action; for if *six months* [calendar months, not lunar, as in temporal matters] have passed, it will not be within the statute Westm. 2. which permits an usurpation to be divested by a *quare impedit* brought *infra tempus semestre*. 2 Inst. 261. 4. Of what value yearly the living is, and this in order to assess damages according to the stat. Westm. 2. before which statute no damages were allowed; but by that statute, if *six months* pass by the disturbance of any, so that the bishop do confer to the church, and the patron loseth his turn, damages shall be awarded to two years value of the church; and if six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the *half year's* value of the church.

Of the four things necessary for jury to enquire.

D. Of the Writ of Inquiry, &c.

D.

If all the defendants make default upon the *distress*, the plaintiff has judgment against all, for all are supposed disturbers. R. Mod. 81. and that without title made. F.N. B. 38. 11. Semb. cont. 1 Brown. 158.

If judgment by default.

But if the plaintiff recovers upon *demurrer*, there must be a *writ of inquiry* issued to inquire of the preceding *four points*, before the plaintiff has final judgment, and a writ to the bishop. R. Mod. 81.

If on demurrer.

Or after a verdict for the plaintiff, if the jury have omitted to inquire of these points, there shall be a *writ of inquiry*; and till this is executed, the writ to the bishop shall stay. 1 Bro. Ent. 327.

If jury omit to enquire at the trial.

If

If the patron and incumbent confess the action, or *nil dicunt*, &c. there shall be judgment for the plaintiff, and a writ to the bishop.

Of the damages. If the church remains void, the plaintiff shall recover no damages; and if the jury assesses them, a *remittitur de damnis* must be entered. 3 Lev. 59. 2 Inst. 362.

The damages are to be recovered against the disturber; and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff shall recover the value as well against him as against the patron. But no damages shall be recovered against the bishop, where he claims only as ordinary—and *note*, The king is not within the statute, because by his prerogative, he cannot lose his presentation. 6 Co. 52.

Ⓒ. Of the Judgment in *Quare Impedit*, &c.

Effect of judgment,

If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover his presentation; and if the church be found to be full, by the institution of any clerk, to remove him, unless it were filled *pendente lite*, by lapse to the ordinary, he not being a party to the suit, in which case the plaintiff loses his presentation *pro hac vice*, but shall recover *two years* full value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of his insolvency, he shall be imprisoned for two years. Stat. West. 2. f. 5. f. 3.

as to the presentation;

as to damages.

If the action was commenced within six months, and the plaintiff have judgment to recover his presentation, and the church be full, whereby the former presentation shall be deraigned, then damages shall be awarded to the plaintiff for half a year's value of the church.

Of the writ ad admittendum clericum.

Upon the plaintiff's recovering his presentation, the writ issued in consequence thereof is a writ directed to the bishop, called a writ *ad admittendum clericum*; which recites the judgment of the court, and orders him to admit and institute the clerk presented; and if

upon

upon this order he does not admit him (the clerk being duly qualified), the patron may sue the bishop in a *quare non admisit*, and recover ample satisfaction in damages.

The writ *ad admittendum clericum*, is to this effect :

"GEORGE the Third, by the grace of God, of
"Great Britain, France, and Ireland king, defender
"of the faith, and so forth. To the reverend father in
"God, Thomas by divine permission bishop of
"greeting : Whereas A. B. has lately in our court,
"before our justices of the Bench, in Westminster, by
"the consideration of the same court, recovered against
"you and E. F. clerk, and C. D. his presentation to the
"rectory and parish church of in our county
"of and your diocese, which became vacant,
"and belongs to his presentation : and whereupon it
"was considered by our said court of the Bench, that
"the said A. should have our writ to you the said
"bishop, the ordinary of that place, to be directed ;
"and notwithstanding your disclaimer, and the claims
"of the said E. F. and C. D. or either of them, you
"should admit a fit person to the rectory and parish
"aforesaid, at the presentation of the said A. We
"therefore command you, that notwithstanding your
"disclaimer, or the claims of the said E. F. and C. D.
"you admit a fit person to the rectory and parish church
"aforesaid, at the presentation of the said A. And
"how you shall have executed this our writ, certify to
"us on wheresoever we shall then be in Eng-
"land. Witness Sir James Eyre, knight, at West-
"minster, the day of in the thirty-sixth
"year of our reign," &c.

Form thereof.

By the stat. of Westm. 2. c. 30. the judge of *nisi prius* has power to give judgment immediately; yet if he do not, upon the return of the *poslea*, judgment may be given by the court to which the return is made.

When judgment to be given.

If the plaintiff is nonsuited, the judgment is peremptory, and the defendant shall have a writ *ad admittendum clericum* to the bishop. 1 Brownl. 161. But not before title made. F. N. B. 38. k.

How if plaintiff nonsuited.

But

If judgment on
demurrer.

But if he has judgment upon *demurrer*, he shall have a writ to the bishop presently.

But the defendant cannot have a writ to the bishop, if the *quare impedit* abates for form, misnomer, or insufficiency. R. 7 Co. 27. b. F. N. B. 38. m.

How ordinary
to obey the writ.

Note, If the ordinary does nothing upon the writ *ad admittendum clericum*, the party may have an *alias* and *pluries*, which may be returnable, and after that an attachment. Reg. 42. a. 80. F. N. B. 38. c. Dy. 254. b. 350. a.

There was a fine of 10*l.* for a bad return upon the first writ, and an *alias* under the penalty of 100*l.* 3 Leon. 139.

If the incumbent of which the church is full, was not a party to the writ, he shall never be removed. Co. Lit. 344. b.

Of costs.

Of writ of error.

By the 3 Hen. 7. c. 10. [which gives *costs* upon writs of error brought if judgment be affirmed] if the defendant bring a writ of error, and the judgment be affirmed, the plaintiff shall recover his costs and damages for his wrongful delay.

By virtue of this statute, the court of King's Bench have, upon a writ of error, awarded damages according to the value of the church found by the verdict. Cro. Jac. 145. 175.

Of damages.

But as the real damages which the plaintiff sustains is only the being kept out of the half year's value, the legal interest on that seems to be all he is entitled to. Stra. 931.

Of the construc-
tion of the dif-
ferent statutes
relating to costs.

In *quare impedit* the bishop pleaded no claim, but as ordinary, judgment passed against C. for non-appearance on a *disfringas*. And an issue between the plaintiff and incumbent on the right of presentation was tried, and a verdict found for plaintiff. Afterwards a writ of inquiry was awarded to inquire of the *four usual* matters. And by the inquisition it was returned, that the vicarage was

was full of the defendant (incumbent) on the presentation of the king—that it began to be vacant 26th June 1746, on the death of J. R. clerk, and that the value by the year was 120 *l.* On which return, plaintiff moved for *costs*, damages being given by the stat. Westm. 2. and by the statute of Gloucester, costs are given in all cases where damages, and cited 3 Lev. 35. Skinn. 25. On shewing cause, the rule was discharged. The statute of Gloucester, 6 Edw. 1. relates to cases at common law, and statutes antecedent. The subsequent statute of Westm. 2. [13 Edw. 1.] created damages in *quare impedit*, where there were none before at common law, and gives *two years* value where the term is lost by disturbance and lapse *pendente lite*; if not, and the living full, then half a year's value. Pinfold's case. 10 Co. where the damages are created (none before), there no costs; where the damages are additional, there costs. Sir T. Jones, 234. Keilway, 26. In *quare impedit*, the king has no damages, because he is not within the stat. of Westm. Hob. 23. If a writ of error is brought, and the judgment affirmed, then costs are given by the stat. Hen. 7. No costs in any other instance. *Lemax v. Bp. of London*. Crespin Clerk, and Coke, Barnes, 139.

SECTION IV.

Right—Writ of.

The writ of right is the highest writ in the law. It only lies of an estate in fee simple, and is used either when no *possessory* action can be brought on account of the statute of limitations having attached, or when such action has been brought and judgment given against demandant.

What, and when to be brought.

Even the remedy by writ of right must be prosecuted within sixty years of the person under or through whom demandant claims: for after sixty years uninterrupted possession, no title is suffered to be impeached.

And

And in order to maintain a writ of right, the demandant must shew an *actual seisin* either in himself or his ancestor from whom he claims by taking the *essles*. *Dally v. King*, 1 H. Blac. 1.

Of the Proceedings therein.

Get writ of curfitor upon which sheriff must cause the tenant to be *summoned* by good summoners, which must be by personal service, or on the land, and *proclamation* must be made at the most usual door of the parish church where the lands lie. Sheriff must make return of writ, indorsing thereon the names of the *summoners* and the day he made proclamation. Upon default of tenant in *not appearing* nor *essoigning* on return of writ, a *grand cape* issues commanding sheriff to seize the lands demanded. Tenant may on return thereof come in and save his default which is generally the case. Demandant then *declares* or *counts*. Tenant *pleads*; if the general issue, he does not conclude to the country in the usual way, but *he puts himself upon the grand assize*, praying a recognition to be made *whether the greater title be in him or in demandant*. Upon the issue or *mise* as it is called, being so joined between the parties, a writ or *summons* is directed to sheriff commanding him to summon *four knights girt with swords*, to be before the justices at Westminster on the return of the writ, to make *election of the grand assize*, between demandant and tenant. If sheriff make no return thereof, an *alias writ of summons* issues, which is returned with the names of the *four knights summoned*. Upon the return thereof, the four knights appear in court, and being placed in the jury box, are severally sworn lawfully and truly to chuse *twelve knights girt with swords*, of themselves and others, which best know and will declare and say *the truth between the parties*. The four knights having chosen of themselves and others *twenty-four*, a writ of *venire facias* then issues, commanding the sheriff to cause to come before the justices of C. B. the four knights and the other persons named by them, *recognitors*, chosen to make recognition of the grand assize between the demandant and tenant. Upon the day of trial, the recognitors appear, or best part of them, who are sworn, and try the matter of *right* between the parties. If they give a verdict for demandant, he has judgment.

Judgment to recover his *seisin* against the tenant to hold to him and his heirs quit of the said tenant and his heirs forever.

See Booth on Real Actions, and the case of *Tyssen and Clerk* in Wilson's Reports.

SECTION V.

Waste.

Waste is the committing any spoil or destruction in houses, lands, &c. by tenants, to the damage of the heir, or him in reversion or remainder: whereupon the writ or action of *waste* is brought for recovery of the thing wasted, and damages for the waste done. Waste, what.

The stat. 52 Hen. 3. c. 22. s. 2. enacts, "That farmers during their terms shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to farm; unless they have special licence by writing or covenant, mentioning that they may do it. Which thing if they do, and thereof be convicted, they shall yield full damages, and shall be amerced grievously." How prohibited by statute.

For an exposition of this statute, see Bac. Abr. s Vol. 460.

Waste may be committed, not only in houses and lands, but in gardens, orchards, timber trees, dove-houses, warrens, parks, fish-ponds, and other subjects of property. Where committed.

There are two kinds of *waste*, viz. *voluntary* or *actual*, and *negligent* or *permissive*. *Voluntary* may be done by actual pulling down or prostrating houses, or cutting down timber trees; *negligent*, by suffering houses to be uncovered, whereby the timber and spars are rotted. Waste, voluntary or negligent.

The persons who may be injured by *waste*, are such as have some interest in the estate wasted; as a *remainder-man*. Who may be injured thereby.

man or reversioner. What shall be deemed waste, and what not, *vide* Bac. Abr. 461. &c. and Com. Dig. 5 Vol. 638. &c. and *vide ibidem*, by whom, and against whom, waste lies.

Of the meaning of, without impeachment of waste.

See also the case of *Pyne v. Dor*, 1 D. & E. 54., in what cases tenant for life, without impeachment of waste, will be restrained.

It may be proper to consider—

- A. The Remedy in Waste.
- B. The Process in Waste.
- C. The Count in Waste.
- D. The Pleadings and View.
- E. The Judgment in Waste.

1.

A. Of the Remedy in Waste.

Remedy, two kinds.

The redress for the injury of waste is of two kinds, *preventive* and *corrective*: the former of which is by writ of *estrepement*, the latter by that of *waste*.

Writ of estrepement.

The writ of *estrepement* was a remedy at common law, after judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in an estate, which was determined to be no longer his.

The stat. of Gloucester gave the writ of *estrepement* also, *pendente placito*, to inhibit the tenant from doing waste till the suit was determined.

Injunction in equity.

Besides this preventive writ at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an *injunction*, in order to stay waste until defendant shall have put in his answer, and the court shall make further order; which is now become the usual way of preventing waste.

Besides the above methods to prevent waste, there is an action of waste, partly founded at common law, and partly upon the stat. of Gloucester, 6 Edw. 1. c. 5. by which "a man may have a *writ of waste* in Chancery against a man who holds by the law of England, or in other manner, for term of life, or years, or in dower; and he who shall be attainted of waste, shall lose the thing which he has wasted, and make a satisfaction of *treble* of what the waste shall be taxed at."

Writ of waste,
partly given by
statute.

This statute gave a *writ of waste*, but before this, by the stat. of Marl. 52 Hen. 3. a writ of prohibition was given for waste.

After which statutes, the stat. Westm. 2. 13 Edw. 1. c. 14. enacted, "That of all manner of waste done to the damage of any person, there shall henceforth be no writ of *prohibition* awarded, but a writ of *summons*; so that he, of whom complaint is, shall answer for waste done at any time. And if he come not after the *summons*, he shall be attached; and after the *attachment*, he shall be distrained. And if he come not after the distress, the sheriff shall be commanded, that in proper person he shall take with him twelve, &c. and shall go to the place wasted, and shall inquire of the waste done, and shall return an inquest; and after the inquest returned, they shall pass unto judgment, like as it is contained in the stat. of Gloucester."

Of the process
thereon given
by statute.

And by c. 22. of same statute, the action of waste is maintainable by one *tenant in common* against another. The equity of which extends also to *joint-tenants*, but not to *coparceners*; because they might make *partition*, and so prevent waste.

By whom main-
tainable.

The action of waste is a mixed action; partly real, so far as it recovers land, &c. and partly personal, so far as it recovers damages.

Nature of the
action.

But this *mixed* action is now seldom used, the general mode of proceeding by the reversioner against the tenant for waste, being by an action upon the case, in

Action on the
case, now sub-
stituted for it.

the nature of waste, which is a common personal action, in which damages for the waste done can only be recovered.

B.

B. Of the Process in Waste.

Of the proceedings.

The process incident to an action of waste is a *summons* on the *original*, which the *curfitor* will make out from a *præcipe*.

By summons.

If it is against tenant in *dower*, or guardian, it does not recite the statute; but if it is against the tenant for life, or years, or by the curtesy, it does.

Form thereof against tenant in dower.

The writ is to this effect, if against tenant in *dower*:

"The king, to the sheriff of If A. shall make
"you secure, &c. then summon, by good summoners,
"B. who was the wife of C. that she be before our
"justices at Westminster, on, &c. to shew wherefore
"she hath committed waste, sale, destruction, and
"banishment of lands, houses, woods, gardens, &c.
"which she holds in dower, of the inheritance of the
"aforesaid A. in to the disherison," &c.

If against tenant for life or years, it is to this effect:

Against tenant for life or years.

"The king to the sheriff of If A. shall make
"you secure, &c. then summon, &c. B. &c. Where-
"fore seeing that it is provided by the common council
"of our realm of England, that it shall not be lawful
"for any person to commit waste, sale, or destruction
"of lands, houses, woods, or gardens, the same B.
"hath committed waste, &c. of the lands, houses,
"woods, and gardens in L. which the aforesaid A.
"demised to him," &c.

For other forms, see Fitzherbert's *Natura Brevium*, &c.

How writ to conclude.

If waste is brought by the bishop, or ecclesiastical person, the writ concludes *ad exharedationem episcopi vel ecclesie*.

On the return of the *summons*, the defendant makes *essoign* and the plaintiff adjourn, &c.

In waste, *summons* and *severance* lie, for the writ is *ad exheredationem*, and it is a plea real. 2 Inst. 307.

If the tenant does not appear at the return of the *summons*, then plaintiff applies to the *filazer* of the county, for a *pone* or *attachment*, which is to the same effect; only "commanding the sheriff if A. shall make him secure, to put B. by safe gages and pledges," &c. On the return of which the plaintiff may apply for a *distingas*, commanding the sheriff to *distrain*, the tenant to appear, &c.

How if no appearance.

If the tenant appears, the plaintiff declares against him, and the tenant pleads, or lets judgment pass by default. If the tenant does not appear, a writ of inquiry goes to the sheriff; and on return thereof, plaintiff has judgment: of which, *vide post*, title Judgment in Waste.

In waste against two by the bishop *ad exheredationem ecclesie*, and process continued till the grand distress returned, one came and the other made default; and he who appeared, was compelled to answer alone, for the process is determined against the other. Bro. tit. Waste, pl. 99.

How if one appear and the other makes default.

When the summons is served upon the tenant, or upon the land, *fourteen days* before the return thereof, *proclamation* must be made of the summons on a Sunday, at or near the most usual door of the church or chapel of the town or parish where the lands lie; and that proclamation must be returned, together with the names of the summoners, pursuant to the 31 Eliz. c. 4.

Of the proclamation.

Ⓒ. Of the Count in Waste.

Ⓒ.

The plaintiff must charge the defendant in the *tenet* or *tenuit*, for there is no other form. Cro. El. 356.

How defendant to be charged.

And must charge him as assignee, executor, &c. or according to the defendant's tenure.

What the count
must shew.

And the count must shew how plaintiff is entitled to the inheritance, as, if rector, he must shew that he is so. If he counts upon a lease by himself, he must shew his seisin in fee and demise to defendant. If upon a lease from his ancestor, he must shew *seisin*, a demise to defendant and descent to himself. If he claims by fine, he must shew it, and the uses of it. So if by common recovery; so if by grant of the reversion; so if he and defendant are joint-tenants, he must shew that they are so: so if he and the wife sue in right of the wife; if he has the reversion, he shall say the defendant holds of him; otherwise, if he in remainder brings waste; or if the lord by escheat does, for there is no tenure of him. Hutt. 110.

It must be con-
formable to
writ.

The declaration also must be conformable to the writ, for if the writ is for waste in land, and it is assigned in cutting wood, it is bad.

So, if the writ is for waste in three *villes*, and the declaration is for waste in one or in another *ville*.

The declaration must also particularize the quality and quantity of the waste: as if in cutting trees, it must shew the number of the trees; if in houses, it must shew the defects.

How to con-
clude.

And must conclude if to his own disherison, *ad exheredationem* of the plaintiff.

If of lands whereof he is seized in right of his wife, *ad exheredationem* of the wife.

And if by a bishop, &c. it must conclude *ad exheredationem ecclesie*. 2 Roll. 832. l. 30.

D.

D. Of the Pleading and View in Waste.

Of pleading in
abatement.

Defendant in waste may plead in abatement of plaintiff's title; as if he entitles himself to the reversion in fee, defendant may shew a devise to him *in tail*. Lutw. 1557.

As to pleas in bar, defendant may plead *no waste* Of pleading in bar. done, which is the general issue, and this admits nothing, but puts the whole declaration in issue. Lutw. 1547. Or he may plead a release: or to waste in the *tenuit*, accord and satisfaction. Croll. 357.

So, defendant may justify, that he took for repairs; so that he took for necessary *botes*; or that the trees were *aride mortua*, and neither bore fruit or foliage; or that the lease was without impeachment of waste: or he may plead no demise to him; or that a *mesne* remainder man is alive.

Or he may plead in excuse *quod reparavit* before action brought, or that he rebuilt, and has since kept in repair. Or that the premises were so ruinous at the commencement of his lease, that he could not repair. Mo. 54.

After issues joined, the *venire facias* recites the issues, Of the proceedings after issue. and commands the sheriff that he cause to come twelve, &c. to inquire if the defendant hath committed waste as plaintiff alleges. Cro. Car. 381.

In waste, if issue is joined, the jury ought to have a view of the place or places wasted, otherwise trial shall be stayed: and six at least must have a view. Of the view when necessary. 2 Saund. 254. And the *venire facias* must be that the jury shall have a view.

So, if there is judgment for want of appearance to the *disfringas*, there must be a view and inquisition taken, as well as upon issue joined. R. Ow. 12. For the law will not suffer so heavy a judgment as the forfeiture of the thing or place wasted, and *treble damages* to be passed upon a mere default, without full assurance that the fact is according as it is stated in the writ.

But upon default made after appearance and plea, When no view necessary. there shall be no inquiry of *waste*, for this case is not within the purview of the statute of Westm. 2. 2 Inst. 390, but inquiry of the damages only.

Nor shall there be inquiry of the *waste*, upon a judgment by *confession*, *nil dicit*, or *non sum informatus*, but inquiry

Inquiry of the damages only : for the waste is confessed.
Cro. El. 18. Hutt. 44.

C.

C. Of the Judgment in Waste.

The effect of the
judgment.

By the statute of Gloucester, plaintiff in an action of waste is to recover the thing wasted, and *treble damages*.

If the judgment is against the defendant in the *tenet*, then it shall be for the place, and the *treble damages* found by the inquest.

But if it is against him in the *tenuit*, judgment shall be for the *damages only*.

If waste be assigned in three houses, two gardens, &c. the jury ought to find damages severally for every of them ; for if it be but of small value for any of them, the court will not adjudge it waste as to that part : but if the jury gives entire damages, it shall not be intended that there were *petit damages* in any, and therefore the verdict will be good. Cro. Car. 414. 452.

If verdict is for defendant, the judgment shall be *quod quærens nil capiat*, &c. and defendant *eat inde sine die*. 2 Saund. 247.

And if the defendant will not pray judgment to avoid a writ of error, it may be entered upon the prayer of the plaintiff against himself. 2 Saund. 253.

Of recovering
the place wast-
ed and damages.

If plaintiff recovers upon the *tenet*, he has a writ of *seisin* for the place wasted, provided the particular estate be still subsisting (for if it be expired, there can be no forfeiture of the land) : and the damages are to be recovered in the same manner as all other damages, by *ca. sa. fi. fa.* or *elegit*.

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C H A P. XVIII.

Of Proceedings in particular Cases.

SEC. I. *Arbitration.*SEC. 2. *Audita Querela.*SEC. 3. *Habeas Corpus.*SEC. 4. *Outlawry.*SEC. 5. *Prohibition.*

SECTION I.

Of Arbitration.

MUCH reading may be found in the books upon the law of arbitration; but it is conceived that in the present work nothing more is necessary than to shew the practical proceedings in cases of references, and of enforcing obedience to awards, with a few general observations thereon.

The leading distinction is, whether the reference be such as can be carried into effect by the summary interposition of the court? *i. e.* by attachment; or, whether the party must resort to his action upon the award?

Distinction as to the remedy on awards.

A submission to arbitrators may be made either *after* an action is brought, and whilst it is depending, or *before* any action is commenced. Now, whenever a reference is made pending a suit, if *before* trial, the court, having already jurisdiction by the action being brought, may make a rule of court of the agreement of the parties to submit to arbitration, and afterwards give efficacy to that rule by attachment; or, if the reference be made *at* the trial, which is often done, it is then by order of *nisi prius*, which order may be afterwards made a rule of court; so that in all cases of reference pending

According as submission is pending an action or not.

How if pending an action.

a cause, the agreement of the parties may be made a rule of court, and enforced by the process of the court.

How if no action.

Of stat. 9 and 10 W. 3.

Its operation.

But inasmuch as it was often expedient to refer matters in dispute to arbitration, *without* any action being brought, and yet for want of the parties being before the court, no rule of court could at common law be made upon them, and so no remedy by attachment in such case be had, the legislature interposed, and by the stat. 9 and 10 W. 3. remedied the evil, thereby putting laws of arbitration, where *no suit* is pending, upon an equal footing with those where *there is a cause* depending. This is the true operation of the statute; for as to arbitrations where a cause is depending, it is only declaratory of what the common law was before. Burr. 701.

Now therefore, in all cases without any action depending, it is in the power of the parties submitting to arbitration to proceed upon the statute, and have the summary remedy by attachment: but if the statute be not adhered to, they must proceed as at common law.

In treating this subject, we will consider the proceedings in cases:—

A. Of References to Arbitration, where no Cause is depending, according to the Stat. 8 and 9 W. 3.

B. Of such References where the Case is not within the Statute.

C. Of References made *after* Action brought, but *before* Trial.

D. Of References *at the Trial*, by Order of *Nisi Prius*.

E. General Observations as to the Extent and Operation of the Submission, enlarging the Time for making the Award, setting aside the Award, &c.

A. Of

2. Of References, where no Cause is depending,
according to the Statute.

3.

By the statute 9 and 10 W. 3. c. 15. reciting, that
 "Whereas it hath been found by experience, that refer-
 "rences made by rule of court have contributed much
 "to the ease of the subject in the determining of con-
 "troversies, because the parties become thereby obliged
 "to submit to the award of the arbitrators, under the
 "penalty of imprisonment for their contempt, in case
 "they refuse submission; now, for promoting trade and
 "rendering awards of arbitrators the more effectual in
 "all cases for the final determination of controversies
 "referred to them by merchants and traders, or others,
 "concerning matters of account or trade, or other mat-
 "ters, *Be it enacted, &c.* That it shall and may be
 "lawful for all merchants and traders, and others, de-
 "siring to end any controversy, suit, or quarrel, con-
 "troversies, suits, or quarrels, for which there is no
 "other remedy than by personal action, or by suit in
 "equity, by arbitration to agree, that their submission of
 "their suit to the award or umpirage of any person or per-
 "sons should be made a rule of any of his Majesty's courts of
 "record which the parties shall choose, and to insert such
 "their agreement in their submission, or the condition of the
 "bond or promise, whereby they oblige themselves re-
 "spectively to submit to the award or umpirage of any
 "person or persons; which agreement being so made
 "and inserted in their submission, or promise, or condi-
 "tion of their respective bonds, shall or may, upon
 "producing an affidavit thereof, made by the witnesses
 "thereunto, or any one of them, in the court of which
 "the same was agreed to be made a rule of court, and
 "reading and filing the said affidavit in court, be en-
 "tered of record in such court, and a rule shall thereupon
 "be made by the said court, that the parties shall submit to
 "and finally be concluded by the arbitration or umpi-
 "rage which shall be made concerning them by the
 "arbitrators or umpire, pursuant to such submission;
 "and in case of disobedience to such arbitration or um-
 "pirage, the party neglecting or refusing to perform
 "and execute the same, or any part thereof, shall be
 "subject to all the penalties of contemning a rule of
 "court;

Statute 9 and
10 W. 3.

Parties may
agree to make
submission a
rule of court;

which, upon af-
fidavit, shall be
done.

"court; and the court, on motion, shall issue process accordingly; which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear, on oath, to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means."

How the consent must be expressed.

By the words of the statute, it must be inserted in the agreement or condition of the bond that the submission should be made a rule of court; but where in the end of the condition of the bond was this clause; "And if the obligor shall consent that this submission shall be made a rule of court, that then," &c.; on motion to make this submission a rule of court, and on cause shewn against it, as the party would rather have forfeited the penalty, the court held these conditional words to be a sufficient indication of consent, and made the award a rule of court. Salk. 72. Ld. Raym. 674.

So, where on motion to make a submission a rule of court, pursuant to the statute 9 and 10 W. 3. objection, that the agreement to make the submission a rule of court was no part of the condition, but was underwritten, and not signed; but it appearing by affidavit, that the subscription was made before the execution of the bond, it was taken by the court to be part of the submission, as an indorsement by way of defeasance is part of the deed; and the submission was made a rule of court. *Carter v. Mausbridge*, Barnes, 55.

What is evidence thereof.

Where the bond produced is executed only by one, the other may have the submission made a rule of court, Bar. 55.

What it must express.

But the consent expressed in the bond or agreement must be to make the *submission* a rule of court; if it is to make the *award* a rule of court, it is not within the act. *Harrison v. Gimary*, Str. 1178.

In order, therefore, for the submission to be within the statute, it must be in *writing*, and it must contain an agreement to make such submission a rule of court.

Having

Having shewn what submissions are within the statute, the next thing is to point out how to proceed thereon, if the award is made in due time, and not impeached, (of which see *post*, §.) provided the other party refuse to comply with it. First make the submission a rule of court, which is done by motion, and is absolute in the first instance; it must be moved upon an affidavit of the due execution of the bond, by the subscribing witness; which affidavit is to be engrossed on a treble 6d. stamp paper; and may be as follows.

How to make
submission a
rule of court.

"T. S. of, &c. maketh oath, and faith, that he was
"present at the time of signing and sealing the bond
"or obligation hereunto annexed; and A. B. of, &c.
"therein mentioned, did duly sign, seal, and as his act
"and deed deliver the said bond in the presence of this
"deponent; and that the name A. B. set and subscrib-
"ed to the said bond, is of the proper hand-writing of
"the said A. B. and that the name T. S. set and sub-
"scribed, as the witness thereto, is of the proper hand-
"writing of this deponent."

**Affidavit of
subscribing
witness to ar-
bitration bond.**

Get rule of clerk of rules in B. R. and secondary in C. B.; make copy thereof, and of the award. Let the party who is to receive the money or thing awarded demand the same; and upon refusal make an affidavit of such demand and refusal, and also an affidavit of the execution of the award; which may be as follows:

Of service of
rule, and mak-
ing demand.

"In C. B.

"Between { X. Y. Plaintiff,
and
R. W. Defendant.

"X. Y. of, &c. maketh oath, and saith, that he this
deponent, on the 10th day of November last, did
personally attend from the hour of ten until the hour
of twelve of the clock in the forenoon of the same
day, at the Great Hall of Lincoln's Inn, and then
and there demanded of the above-named R. W. who
also attended, the sum of 100 l. awarded due to this
deponent, pursuant and agreeable to a certain award
in writing, which is hereunto annexed; but the said
R. W. did not then pay to this deponent the said sum
of 100 l. or any part thereof; and this deponent fur-
ther saith, that having, on Tuesday next after in this
present

Affidavit of service and demand, &c.

" present term, caused the submission of this deponent
 " and the said R. W. to the said award contained in a
 " certain bond or obligation, bearing date the 14th day
 " of December 1794, to be made a rule or order of
 " this honourable court, he this deponent, on the
 " day of served the said R. W. with a true copy
 " of the said rule or order of this honourable court, and
 " at the same time shewed him the said original rule or
 " order; and this deponent further saith, that he did
 " at the same time demand of him the said R. W. the
 " said sum of 100 l. so awarded due to this deponent;
 " and this deponent further saith, that the whole of the
 " said sum of 100 l. now remains due and owing to
 " this deponent, pursuant to the said award."

**Affidavit of due
 execution of the
 award.**

" A. B. of, &c. gentleman, maketh oath, and saith,
 " that he did see C. D. of, &c. sign, seal, publish, and
 " declare his final award and arbitrament between X. Y.
 " of, &c. merchant, and R. W. of, &c. goldsmith,
 " bearing date the 10th day of January 1795; and this
 " deponent further saith, that the name C. D. set and
 " subscribed against the seal, as the party executing the
 " said award, is of the proper hand-writing of the said
 " C. D. and that the names A. B. and J. E. set and
 " subscribed thereto, as witnesses attesting the execu-
 " tion of the said award, are of the respective hand-
 " writings of this deponent and the said J. E."

**Of moving for
 attachment.**

Upon these affidavits move for an attachment; it is
 a rule to shew cause: Get it of clerk of rules, or se-
 condary, and serve copy thereof: At expiration of rule,
 move to make it absolute, on proper affidavit of service;
 take it to crown-office; your clerk in court there will
 prepare attachment; get a warrant thereon, and give it
 your officer to make the caption.

**How if demand
 made by third
 person.**

If the demand of the money or thing awarded be
 made not by the party entitled, but by a third person,
 there must be a letter of attorney for that purpose, and
 an affidavit of the due execution thereof; and the power
 of attorney must, together with the award, rule, &c.
 be produced and shewn at the time demand is made.

**Court will com-
 pel witness to
 make affidavit.**

If the subscribing witness refuse to make affidavit of
 the execution of the bond, the court, on motion, will
 compel him so to do. *Clark v. Elwick*, Str. 1. Bar. 58.

15. Of

B. Of such References where the Case is not within the Statute.

B.

When the submission, there being no action depending, is by *parol* or by written agreement, or by bond without any clause in the agreement or condition of the bond, that the submission should be made a rule of court, which the statute requires; the remedy in case of disobedience to any award made thereon is by action; either an action on the case, or debt upon the bond; in the last of which the penalty of the bond may be recovered; or of covenant, if the submission were by deed; but no attachment can go against the party. The proceedings therefore are as in other actions.

Of the remedy where the reference is made pending no action, and not according to statute.

C. Of References made after Action brought, but before the Trial.

C.

A reference pending an action may be made by a rule of court originally, or by any written agreement or bond, or the like; which submission may be made a rule of court, although no such clause is inserted therein; because the court hath already jurisdiction by the action.

If the award be made, and either party refuses to comply with it, the other must make the submission a rule of court (provided it was not a submission by original rule). This is done by affidavit of one of the witnesses of the due execution of the bond or agreement containing the submission in same manner as above mentioned, A. He may then proceed to get an attachment; which is done as above described, A.

If the demand is for taxed costs, a copy of the rule, with the master's allocatur thereon, must be shewn, together with the copy of the award, &c.

If the demand is made by letter of attorney, it must be by letter of attorney as *ante*, A.

D. Of

D. **D.** Of References at the Trial by Order of
Nisi Prius.

Causes are often referred to arbitration by the consent of the parties (for they cannot be without) at the time of the trial. And when there are bail in the action, it is advisable for plaintiff to take a verdict subject to the reference which prevents the discharge of the bail, and gives him afterwards the election, should the award be in his favour, to proceed by attachment upon the award, or to take out execution: But neither can be done without leave of the court.

For the mode of proceeding on such references, see vol. I. ch. 10. sec. 5. where references at *nisi prius* are treated of.

E.

E. *Several Observations.*

- E. 1.** Upon the Extent of the Submission.
- E. 2.** Of the Revocation thereof.
- E. 3.** Of enlarging Time for making the Award.
- E. 4.** Of the double Remedy, by Action or Attachment.
- E. 5.** Of the Affidavits on moving for an Attachment, and of the Nature of the Attachment.
- E. 6.** Of the Costs on Arbitrations.
- E. 7.** Of impeaching and setting aside the Award.

E. 1. **E. 1.** Of the Extent and Operation of the Submission.

Powers of arbitrators.

On a reference to arbitration, the arbitrators can only have jurisdiction over such matters as are included in the reference. So that an award made upon a reference of all matters in difference between the parties

does not preclude the plaintiff from suing upon a cause of action, subsisting against the defendant at the time of the reference, upon proof that the subject matter of such action, was not laid before the arbitrators, nor included in the matters referred. *Ravee v. Farmer*, 4 D. & E. 146.

Of suing for cause of action subsisting at time of reference.

And it is material to observe the distinction between a submission to arbitration of all matters in difference between the parties in the cause, and a reference of all matters in dispute in the cause between the parties; for the former being general, is not confined to the subject matter in the particular actions then depending, but will extend to cross demands between the parties, though not pleaded by way of set off; and the costs being to abide the event, will make no difference; but the latter is confined solely to the matters in dispute in that particular cause.

Distinction to be observed in the words of a reference.

The submission made pending an action, must be by the parties to the record; and if afterwards from the award not being made in time, a second submission be made that must also be made a rule of court.

What parties must make the submission.

A submission to an award between A. and B. the parties on the record having been made a rule of court, which award not having been made in due time, the dispute had been referred to a second arbitration to settle by B. and C. who were the real parties in the suit; no attachment can issue against B. for not obeying the award made by the second arbitration, because the reference should be made by the parties on the record, and if even it had there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*, 2 T.R. 643.

And as the court had no jurisdiction in this case, they could not go into the merits, though B. consented to waive the objection. *Ibid.*

If wrong not cured by consent.

A submission to arbitration by an administrator is not an admission of assets. *Pearson v. Henry*, 5 D. & E. 6. Notwithstanding the case of *Barry v. Rybb*, 1 D. & E. 691, may seem to throw some doubt upon the point.

What admitted by a submission.

A sub-

How far it is a stay of proceeding.

A submission to arbitration is not a stay of proceedings in any action, unless expressly mentioned as part of the agreement. *Ld. Ray. 789.*

When it must be made a rule of court.

Though a submission must be made a rule of court before any motion be made to enforce the award, yet it need not be made such rule before the award is made; it is only to give jurisdiction to the court, not to the arbitrators.

§. 2.

§. 2. Of the Revocation or Countermand.

Submission may be countermanded, but the bond is forfeited.

If A. enters into a bond to B. conditioned to stand to the award of C., yet A. may countermand the submission to the arbitration of C. because the submission being a man's own act, is of its own nature revocable. But then by such countermand, or revocation of the power of the arbitrator, the obligee shall take the benefit of the bond, because the obligor has not stood to the arbitration, &c. since he has countermanded the authority of the arbitrator, and because the obligor has, by his own act, made the condition of the bond (which was for his own benefit to save him from the penalty) impossible to be performed, and by consequence his bond is become single, and without the benefit of a condition. *Vynior's case, 8 Co. 82.*

Nor can it be countermanded if a rule of court.

But if such submission be made a rule of court according to the statute, then the party can never revoke it.

Of the punishment for any breach of the rule.

So if it be by rule of court originally; and if either party are guilty of a breach of the rule, as by filing a bill in equity when it was part of the agreement not to do it, court will grant an attachment. *3 Burr. 1256.*

What will be an implied breach.

So if he prevents the arbitrators proceeding, as by serving one of them with a *subpœna* at the time, or the like, it will be construed a breach of the rule. *1 Salk. 73,*

§. 3. Of enlarging the Time for making the Award. §. 3.

If the award cannot be made by the day fixed upon, the time for making it must be enlarged, otherwise the award itself would be nugatory.

This must be done by motion in court, and by giving a brief to another counsel to consent to such motion; for the court cannot enlarge the time without the consent of both parties. How to get the time enlarged: must be by consent.

On motion to set aside an award because it was made out of time, it was argued, that the parties had by their attorneys consented in writing, *after* the time had elapsed, to give a further time for the making of the award. Of the operation of the consent of the parties to enlarge.

The court said that such consent might still be made a rule of court, and have a retrospective operation so as to make the award good. Mich. Term, 36 Geo. 3.

Before any rule to enlarge the time can be made, the submission or order of *nisi prius* as the case is, must be made a rule of court. What necessary before such motion is made.

§. 4. Of the double Remedy by Action or Attachment. §. 4.

It has been already observed, that whenever the court cannot exercise a summary jurisdiction, as in all cases where there is no action depending, and the submission is not within the statute of William, or where it is a submission within the statute, but not made a rule of court, the party can *only* proceed by action; but even where there is a rule of court, still the remedy by action is not taken away, but the party has his election. He cannot however proceed by action and attachment at the same time. *Stocks v. Huggens*, Easter Term, Ld. Hard. 106. Double remedy only where submission is made rule of court.

Where a cause, in which the defendant has been holden to bail, is referred to arbitration, and the arbitrator Party cannot pursue both.

trator awards to the plaintiff a sum exceeding 1*o*l. the defendant may be holden to bail again, in an action upon the award. *Collins v. Powell*, 2 T. R. 756.

C. 5. Of the Affidavits on moving for an Attachment, and of the Nature of the Attachment.

Of entering the affidavits.

When there is no action pending, but the submission has been made a rule of court under the statute, the affidavits on which to apply for an attachment for disobeying the award, need not be entitled in any cause, but the affidavits in answer must. *Bevan v. Bevan*, 3 D. & E. 601.

But if there is a cause depending, the affidavit ought to be entitled, and if it is not, the court cannot take notice of it though the adverse party is willing to waive the objection. *Owen v. Hurd*, 2 D. & E. 613.

No attachment on affirmation of a quaker.

An attachment for non-performance of an award cannot be granted on the affirmation of a quaker: for though it is a suit between party and party, yet an attachment is a criminal prosecution within the proviso of the 6th *sec.* of 7 & 8 W. 3. c. 34.

Granting attachment discretionary in the courts.
When refused.

The granting an attachment is a discretionary power in the court; in some cases it is refused, as where the defendant was a bankrupt, 1 Str. 695.; which is a ground for his discharge, provided he has obtained his certificate, though his bankruptcy happened after he was taken on the attachment. 2 Str. 1152.

So, where there was a contrariety of evidence, the court would not determine it by affidavits, for the plaintiff had his remedy by action on the award. *Hales v. Taylor*, Str. 695.

Q in case of feme sole marrying.

The defendant a *feme sole*, and the plaintiff, agree to a reference. The defendant was awarded to deliver up two notes, and pay a sum of money; she marries and the husband refused to pay; and it was queried, in this case, if the court could grant an attachment against both or either of them? 1 Crom. 265.

A party

A party cannot be taken on an attachment upon a Sunday, it being in the nature of a civil execution. *The King v. Myers*, 1 D. & E. 266.

When attachment must not be executed.

§. 6. Of the Reference as to Costs.

§. 6.

If nothing is said about costs in the reference, it is in the discretion of the arbitrator to award them or not; for the power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator; but when it is expressed that *the costs are to abide the event*, it is not in the power of the arbitrator to prevent the party in whose favour the award is from having costs; for this reason the above provision is often inserted. And such costs are *legal costs*, that is, such as the law would give in case a verdict had been in favor of the party; so that if the award be only to pay 5*s.* for an assault, the costs can only be 5*s.* *Swingleburst v. Altham*, 3 D. & E. 138. *Roe dem. Wood v. Doe*, 2 D. & E. 644.

Power of arbitrator as to costs.

Meaning of costs abiding the event.

Costs awarded must be taxed as between party and party; they cannot be awarded to be taxed as between attorney and client. *Marder v. Cox*, Cow. 127. 2 Blac. 953.

How to be taxed.

Whenever by the award costs are to be paid, such costs are to be taxed by the master in K. B. and prothonotary in C. B. Str. 737. Barr. 58. 1 Crom. 264.

By whom.

But they are only to be taxed to the time of the reference. 1 Crom. 265. *Tynte v. Every*, Bar. 58.

Up to what time;

At *nisi prius*, a juror was withdrawn, and the cause referred, and the question was, whether the prothonotary should allow the costs of the reference? and held not. Bar. 123.

and to what extent.

The costs to be paid must be certain, or at least that which can be rendered certain.

Award of costs must be certain, or capable of being rendered so.

An award was, that the one party should pay the other 10*l.* and the costs of a suit now depending in an inferior court, and then to give mutual releases. *Per Cur.*

A a 2

Cur.

Cur. To pay such costs as the master shall tax, is good, for *id certum est, quod certum reddi potest*. But this is uncertain, and carries it farther than has hitherto been allowed. 1 Crom. 265.

Of costs where cause is referred and again goes to trial for want of an award.

When a cause comes on to trial, and goes off upon a reference to arbitrators; if the arbitrators never make an award, the cause may be carried down a second time, and if the plaintiff prevails and obtains a verdict, costs shall be allowed. *Burchall v. Bellamy*, Bur. 2693.

§. 7.

§. 7. Of Impeaching and setting aside the Award.

Requisites to make an award legal.

To render an award legal and effectual, it should be made agreeable to the submission of the parties, it should not extend beyond it neither to any *matter* not included in it, nor to any *person* not a party to it, nor should it be only *parcel* of the things submitted. It should award nothing *contrary* to law, nor any thing *impossible* to be done, but should be reasonable and *certain*. It ought also to be mutual and *final*. Various are the *legal* objections therefore which may arise as grounds of impeaching an award, all of which must appear upon the *face* of the award itself. They may be taken therefore at any time, either by way of defence to any action brought upon the award, or in shewing cause against an attachment, or by way of motion to set aside the award; provided in the last case the submission has been made a rule of court.

Objections on the face of award when to be made.

Other objections dehors the award.

But objections frequently arise to an award which do not appear upon the award itself, and which therefore can only be brought before the court by affidavit, such as the misconduct of the arbitrators, from motives of corruption or partiality, or some irregularity in the conduct of the parties themselves, or their attorneys, or the like. In which case the time for impeaching the award is limited to the next term after the making of the award, by stat. 9 & 10 W. 3. c. 15. s. 2. which enacts that—

When they must be made.

Within next term after making the award by stat. 9 & 10 W. 3.

“ Any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any

A p
ment f
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161.

"any court of law or equity. So as a complaint of such corruption or undue practice be made in the court where the rule is made, for submission to such arbitration or umpirage, *before the last day of the next term* after such arbitration or umpirage made, and published to the parties."

Every ground of relief in equity against an award, is equally open in this court, upon motion in a summary way to set it aside. 3 Burr. 1259. The extent of the statute.

But the above clause in the statute 9 & 10 W. 3. does not extend to awards made in pursuance of an order of *nisi prius*, but only where the submission is by obligation. *Anderson v. Coxeter*, Str. 301. Not to refer-ences at nisi prius.

It is not however confined to cases of corruption or undue means used by the arbitrators, for when it was moved that an award be referred back to the same arbitration, to reconsider it on the ground that he had not sufficient materials before him at that time, the court held it to be within the statute, and nothing was taken by the action because made too late. *Zachary v. Shepherd*, 2 D. & E. 781. To other cases than those of corruption, &c.

The court on such motion will never enter into the merits of the original cause of complaint, nor will they set aside an award on the ground of corruption in the arbitrators, unless such corruption is manifest. Str. 301. Burr. 701. Corruption must be manifest.

Nor on the ground of misbehaviour in an umpire for receiving evidence from the arbitrators without examining the witnesses, unless he were required to re-examine them, before the making of his award. *Hall v. Lawrence*, 4 D. & E. 589. So must misbehaviour.

A party cannot, in shewing cause against an attachment for not performing an award, impeach the award for defects not appearing on it. But he must obtain a rule for that purpose within the time limited by the above act of parliament. *Holland v. Brooks*, 6 D. & E. 161. What objections may be made in shewing cause against attachment.

SECTION II.

Of Audita Querela.

Formerly when either party had good cause to shew, why a judgment or execution awarded, or likely to be awarded, ought not to be enforced, as if since the judgment a release had been given, or the like; the only mode of proceeding was by *audita querela*. A remedial writ invented to prevent a defect of justice, where a party had a good defence, but by the ordinary forms of law had no opportunity to make it. But now from the indulgence shewn by the courts in granting summary relief upon motion, the action of *audita querela* is rendered obsolete. At the same time a brief account of the proceedings may not be useless to the student, if only to satisfy the curiosity and to shew the great advantage resulting to suitors, from that latitude of equitable jurisdiction, by motion of which courts of law now assume.

For the cases in which an *audita querela* would lie, and by or against whom it should be brought, we refer the reader to Bacon's Abridgments, tit. *Audita Querela*, and shall content ourselves with giving a short account of the proceedings in the action.

Of the Nature of the Action, and whence the Writ issues.

An *audita querela* is an action, in the nature of a bill in equity, to be relieved against oppression. It lies to relieve the defendant, or in some cases the bail in the action. It must be of a matter which the party could not have pleaded before. 1 Will. 98. The writ, after stating that the complaint of the defendant having been heard, *audita querela defendantis*, and after setting out the matter of the complaint, enjoins the court to call the parties before them; and, having heard the allegations and proofs, to cause justice to be done between them.

An *audita querela* shall be granted out of the court, where the record upon which it is founded remains, or returnable in the same court. F. N. B. 105. b.

Out of what
court the writ
issues.

And therefore, if a man recovers in B. R. or C. B. the defendant having a release after judgment and before execution, shall sue the *audita querela* out of B. R. or C. B. where the record is. *Ibid.*

And if a recognizance is acknowledged, and there is a release of it, and then execution be sued on it, the party to be relieved shall sue his *audita querela* out of the same court. *Ibid.*

And such *audita querela* out of the rolls of the same court is *judicial*. *Ibid.*

But it may be *original*, and the party may sue it out of Chancery returnable in the court where the record remains. *Ibid.*

But it cannot be granted out of any court, returnable in the same court, where the record upon which it is founded is not there. *Ibid.*

The writ of *audita querela* shall be allowed only in open court. 1 Bulf. 140. 2 Bulf. 97. 2 Show. 240. And on motion, by Trin. 9 Jac. 1. And therefore, when the curfitor has written the writ, an *allocatur* shall be indorsed by the *secondary* in court.

So, if it be irregularly granted, a *vacat*. shall be entered upon the record. Mo. 354.

In an *audita querela* by two, the death of one shall not abate the writ, for the survivor is not to be restored to any thing he has lost, but to discharge himself of the execution; and thereupon, notwithstanding the death of the other, he may proceed for a discharge *in toto* for himself. Vent. 34. 3 Mod. 249.

Of the Bail in Audita Querela.

If the party applying for the *audita querela* is in actual custody, either upon an arrest in an action on the judgment,

ment, or in execution; his first object is of course to obtain his discharge, which is by putting in bail to the action of *audita querela*.

He must procure four persons to be bail for him: the bail piece is in the following form:

Easter Term, in the twentieth year of King George the Third.

“ To wit, C. D. of, &c. is delivered on bail to prosecute, with effect, a writ of *audita querela* brought by him to be discharged of and from a judgment given against him in the court of our lord the king, before the king himself, at the suit of one A. B. for five hundred pounds of debt, and for damages, costs, and charges, to

“ E. F. of, &c.

“ G. H. of, &c.

“ N. O. attorney.

“ I. K. of, &c.

and

“ L. M. of,” &c.

The condition of the recognizance.

“ You severally acknowledge yourselves to owe A. B. the sum of one thousand pounds—

“ Upon condition that the said C. D. shall prosecute his suit with effect, and if he shall be convicted or make default in the premises, that he shall pay the condemnation-money, or you shall do it for him.

“ Are you content?”

In all cases it is usual, that the plaintiff in an *audita querela* be bailed, if he shews matter in writing for his discharge, and the defendant be demanded whether he can gainsay it. 1 Rol. 133. 384. 2 Rol. 113. l. 5.

If the plaintiff in *audita querela* has a release, or other writing upon which his *audita querela* is founded, the same must be proved in court by the witnesses thereto, before the writ of *audita querela* can be allowed, or a *superfedeas* granted. 1 Sid. 351. Salk. 92.

And

And then, after proof of such release, &c. and allowance of the writ, if he be not in *execution*, he may be bailed by the court, and on motion may have a *superfedeas*. Com. Dig. 1 vol. 489. Salk. 92.

But if the plaintiff in *audita querela* be in execution, he cannot be bailed till the defendant plead to the *audita querela*. Comp. Att. 214.

But where an *infant* was taken in execution, and brought an *audita querela*, he was discharged on clearly proving his infancy. Carth. 278.

An *audita querela* is no *superfedeas* of itself, and therefore execution may be taken out unless a *superfedeas* be actually sued upon the allowance of the writ of *audita querela*. Salk. 92.

If the first writ of *audita querela* abate, upon a second purchased, he may have another *superfedeas*. F. N. B. 104. a.

Of the Process.

The *audita querela* having been granted, the next thing is the process thereon, which differs according to the subject matter of it, and also whether the party applying for it be in execution or not.

If an *audita querela* be founded on record, or the party be in custody, the process upon the *audita querela*, when allowed, is a *scire facias*. But if the *audita querela* is grounded on a matter of *fact*, or the party be not in custody, but only brought *quia timet*, the process on the *audita querela*, when allowed, &c. is a *venire facias*; and on default thereto, a *disringas ad infinitum*. Salk. 92.

If brought by one in *execution*, the *scire facias* is the process. Carth. 303.

If the original suit were by *original writ*, there should be *fifteen days* at least between the *teste* and *return* of the process issued upon the allowance of the *audita querela*, and must be returnable on a *general return*.

But if the original suit were by *bill* (it seems), that *fifteen days* between the *teste* of the first *scire facias*, and *return*

return of the second *scire facias*, are sufficient, i. e. Seven days between the *teste* and return of each writ, and not one ten, and the other five.

And the writ should be returnable on a day certain in term.

But even if the original suit were by *bill*, and the process on the *audita querela* be a *venire facias*, I should apprehend that there ought to be fifteen days between the *teste* and return of that writ; because the second process, issuing upon default thereto, is a *distringas*.

The defendant in the *audita querela* should be warned to appear.

A. being taken in execution, brought an *audita querela*, tested the 21st Nov. a *scire facias* issued and bore *teste* the 6th Nov. The defendant appeared and demurred, and shewed for cause, that the *teste* of the *scire facias* was before the *audita querela*. *Sed non allocatur*, for here the *scire facias* being but to compel the party to appear, and answer the *audita querela*, the appearance has helped the defect of the process; but upon a *scire facias* upon a judgment it may be otherwise, because another judgment is to be grounded upon it. *Vaughan v. Lloyd*, Hil. 20, 21 Car. 2.

Of the Declaration, &c.

If the defendant in *audita querela* appears upon the *scire facias*, *venire facias*, or *distringas*, the plaintiff in *audita querela* declares; in which declaration the whole writ of *audita querela* is recited in the same manner as in a declaration in *scire facias*, with a beginning to this effect:

“ Our lord the king sent to his justices; * *assigned to bold pleas before the king himself*, his writ close in these words, to wit, George the Third,” &c. (and to recite the whole writ of *audita querela*.)

In the declaration in an *audita querela*, the better form is to recite the whole record of the recovery, or it may be recited generally, as “ *Quod cum quidam A.*

* This is the form of beginning in B. R. In C. B. the form is thus, “ OUR lord the king sent to his justices of the Bench,” &c.

“ *super*

nuper scilicet, &c. implacitasset quendam B. &c. super quo
 he found bail, *taliter que in eadem curia nostra processum*
fuit, quod predictus A. recuperet," &c. Co. Ent. 87. b. c.

But if there is a variance between the *audita querela*
 and the record, the writ abates. F. N. B. 104. r.

The declaration ought to comprehend only one *gravenamen*, or at least, if it mentions several, it ought to
 rely upon one only, otherwise it will be double. F. N. B.
 104. r. Cro. El. 809. Dy. 297. b. And the plaintiff
 ought to shew himself aggrieved. *Ibid.*

In the entry of the declaration, after the writ of
audita querela is set forth, the plaintiff suggests the *gravenamen*, and prays to be discharged, &c. Afterwards is
 set out the award of the *scire facias* or *venire*, &c. and the
 recognizance of bail (if the plaintiff was in execution
 and delivered on bail), then the return to the *scire facias*
 or *venire*, and the defendant's appearance.

If the defendant confesses the matter alleged, the
 plaintiff has judgment and discharge by confession; but
 if the defendant denies it, the parties proceed to issue in
 fact, or in law, as in other cases.

No damages or costs can be given to a plaintiff in an
audita querela. Dyer, 194.

If the plaintiff in *audita querela* be nonsuited, though
 he may have a new writ of *audita querela*, he shall have
 no *superfedeas* to stay execution.

If the *audita querela* be brought while the money re-
 covered on the first judgment remains in the hands of
 the sheriff, and not paid over to the party, the court will
 make an order for it to remain there till the *audita*
querela is determined. But it seems, that if the money
 on the first judgment is paid over to the party recover-
 ing it, there is no remedy for it.

But by Windham, Just. Where judgment is had in
 an *audita querela* brought before the former execution
 done, the plaintiff in *audita querela* shall be restored to
 whatever he lost by the execution, which the court
 agreed,

agreed, being founded on a release. 1 Keb. 260. 245.
1 Sid. 74.

Of the Judgment.

By the process of *venire facias*, the plaintiff in *audita querela* may have distress infinite till the defendant appears. But if the defendant does appear and plead after a *scire facias*, and two *nibils* returned, there shall be judgment against him.

But if there is judgment after one *nihil*, it is error. R. Yelv. 88.

If the defendant pleads, and afterwards makes default upon the *scire facias ad audiendum judicium*, there shall be judgment against him.

If there be judgment for the defendant in an *audita querela*, before he have execution upon his first judgment, he may afterwards pursue his execution upon that. 1 Vent. 264.

If the defendant in the first judgment was in execution before the *audita querela*, and in that there is judgment for the defendant, he shall pursue judgment in the *audita querela*. 1 Vent. 264.

SECTION III.

Of the Habeas Corpus.

Habeas corpus,
what.

An *habeas corpus* is a writ for bringing the body of any person who is imprisoned before the court *cum causa detentionis*, and is the proper remedy whenever any one is restrained of his liberty by being confined either in a common gaol or by a private prison, whether it be for a criminal or civil cause, in order that his body and cause may be removed to some superior jurisdiction which hath authority to examine the legality of such commitment, and on the return of the writ either to bail, discharge, or remand the prisoner. Vaugh. 136.

The

The writs of *habeas corpus* used only in criminal cases, are the *habeas corpus ad subjiciendum*, regulated by the *habeas corpus* act 31 Geo. 2. and justly deemed the bulwark of British liberty; and *habeas corpus ad deliberandum et recipiendum*, which is to remove a criminal to the proper place where he committed an offence, to take his trial there.

Of the writs of *habeas corpus* used in criminal cases.

But it is not the object of the present work to treat of criminal proceedings; such writs of *habeas corpus* only as are used in civil cases will be here noticed, which are the following:

Of the writs used in civil cases.

- A. The *Habeas Corpus ad respondendum*.
- B. The *Habeas Corpus ad testificandum*.
- C. The *Habeas Corpus ad satisfaciendum*.
- D. The *Habeas Corpus ad faciendum et recipiendum*.

A. The *Habeas Corpus ad respondendum*.

3.

An *habeas corpus ad respondendum* is when any one is imprisoned at the suit of another upon a legal process in the Fleet or any other prison except the King's Bench prison; and a third person would sue that prisoner in the court of King's Bench, and cannot, because he is not in custody of the marshal of this court; there he may have an *habeas corpus* to remove the prisoner out of the prison where he is, into this court returnable at a day certain, to answer unto this action here, and for that cause it is called *habeas corpus ad respondendum*, because he is to answer the parties action. Also where a person is in custody in an inferior jurisdiction, the plaintiff may bring his *habeas corpus ad respondendum* returnable in this court; and then the defendant cannot nonsuit the plaintiff, nor be bailed, but only by the court of King's Bench, or be committed to the custody of the marshal. 2 Lil. Prac. Reg. 4.

Intent and meaning thereof,

as to bringing up defendant from prison of inferior court.

But no person in custody of an inferior court can be removed by this writ to be charged in a new action by the same person who is plaintiff in the court below, and for the same cause of action for which the defendant is already in custody. *Melrose v. Gardner*, Cow. 116.

Not to be used by same plaintiff for same cause of action.

So,

How used when defendant removes before declaration.

So, if the defendant, a prisoner, removes himself into the prison of another court *before* declaration, and plaintiff wishes to declare against him in the court where he was originally charged, he must bring him back by this writ of *habeas corpus ad respondendum* before he can declare.

Otherwise if removed after declaration.

But if he so removes himself *after* declaration, this writ is not wanted; but plaintiff may proceed to judgment as if he had not been removed, and then bring him back by *habeas corpus ad satisfaciendum* to charge him in execution. See *ante*, ch. 15. sec. 3. §.

How to remove defendant in term time;

This writ may also be used in *term* time by the defendant, a prisoner, to remove himself to another prison; upon which he must be charged in court with a declaration in a bailable action; but if he wishes to remove himself in vacation, he must do it by writ of *habeas corpus cum causa*, as hereafter described, D.

or to charge him with a new action in vacation;

Another use *formerly* made of this was to charge a prisoner with a new action in *vacation* time, for which purpose an *habeas corpus ad respondendum* was sued out tested the last day of the preceding term, and returnable the first of the next term; but this practice is *now* abolished and prisoners are charged in vacation by a bill and declaration as of the proceeding term. See *ante*, page 92.

but now the practice is otherwise.

[Appendix U.]

[For the form of this writ, see *Appendix U.*]

This writ good cause of detainer.

An *habeas corpus ad respondendum* may be granted to the warden of the Fleet, or keeper of an inferior prison of a liberty or franchise, returnable at a day certain in court, and is a good cause of detainer, as well as where a *capias ad respondendum* comes to a sheriff. Rules and Orders in K. B. 57.

What time the court shall retain defendant upon this writ, if a second writ issues.

If one prisoner in the counter be removed into the King's Bench by *habeas corpus ad respondendum*, and intending to go over to the Fleet, procures some friend to bring a *habeas corpus* to bring him thither; he shall not be removed thither till he has answered to the cause here, and he shall not compel the plaintiff to follow after a proling defendant, and so *vice versa* of the Common

mon Pleas; each court shall retain the defendant, in which he is first attached, and after he has answered there, you may carry him where you will. This is fit to be the settled course, if there be any difference between the two courts. Salk. 350.

And at all events such prisoner must remain *two* days after such commitment in custody of the marshal, notwithstanding any other writ of *habeas corpus*. R. 5 W. & M. Must always be detained two days at least.

B. Of the *Habeas Corpus ad testificandum*.

B.

This writ issues when a person is in custody whose evidence is material at any trial. It is directed to the marshal, warden, sheriff, or gaoler in whose custody he is, commanding him to bring such person before the court where the cause is to be tried, to give testimony on the part of the person who sues it out. For the mode of obtaining it, and what persons may be brought up by it, see ch. 9. sec. 9.

Use of habeas corpus ad testificandum.

[For the form of the writ, see *Appendix U.*]

[*Appendix U.*]

C. Of the *Habeas Corpus ad satisfaciendum*.

C.

The *habeas corpus ad satisfaciendum* issues to bring a prisoner from the prison of one court into that of another, in order to charge him in *execution* upon a judgment of the last court.

Intent and use thereof.

It is always necessary when a prisoner, *after* declaration in K. B. removes himself to the Fleet, or, *vice versa*, after declaration in C. B. removes himself to the King's Bench, in which he cannot be charged in execution, because the proceedings and judgment are in another court; he must therefore be brought back to the court from whence he was so removed by this writ.

When necessary.

See proceedings against prisoners, ch. 15. sec. 9.

Prepare

How to sue it out.

Prepare præcipe; fill up writ; get it signed; carry it to the marshal or warden where defendant is prisoner. It must be returnable on a day certain. On the return day, he is brought up, and one of the judge's clerks, upon application, will make out commitment. Pay fee for the return, and bringing up.

The judge's clerk takes the habeas corpus into court with defendant, and the master in K. B. or secondary in C. B. commits him.

In K. B.

There is a duplicate of the writ, on which the master marks the commitment, and delivers it to tipstaff, who carries prisoner over to King's Bench prison. Imp. K. B.

In C. B.

Have the roll in court; secondary marks thereon the habeas corpus, and commitment by the court in the margin of the judgment. R. M. 1654, Imp. C. B.

To whom granted, how cause of detainer, &c.

An habeas corpus *ad satisfaciendum* may be granted to the warden of the Fleet, or to such inferior gaoler, returnable in court at a day certain, and the number roll of the judgment to be indorsed upon the writ by the attorney who sues it out; and such writ to be a cause of detainer. Rules and Orders, K. B. 57.

[Appendix U.] [For the form of this writ, see Appendix U.]

D. Of the Habeas Corpus *ad faciendum et recipiendum*.

Meaning and use thereof.

The writ of *habeas corpus*, which in this place it will be necessary chiefly to enlarge upon, is that of the *habeas corpus faciendum et recipiendum*. It issues only in civil cases where a person is sued and in gaol, and is desirous of being removed to some other gaol, or where he is in the prison of an inferior court for a cause of action arising within their jurisdiction, and wishes to have the cause brought up to and determined by a superior court. It is usually called an *habeas corpus cum causa*.

Called habeas corpus cum causa.

When grantable.

This writ is granted at all times of common rights, without any motion in court upon the delivery thereof to the officer, or court below it instantly supercedes all the proceedings therein.

It may be called the bulwark of our liberty; but it is superior to every other writ of the kind, the *habeas corpus ad subjiciendum* being grantable only in term time upon motion by leave of the court. 2 Mod. 306. 1 Lev. 1.

Formerly, by rule of court, Mich. 1654, this writ could not issue in vacation, nor be made returnable immediately, unless the sheriff or officer, or inferior court to whom it was directed, was within five miles of London; but in such case it was to be made returnable at a day certain in court.

May issue in term or vacation.

But that rule has been declared obsolete; and this writ of *habeas corpus*, though directed to a gaoler, &c. of any distant county, may be made returnable before a judge, and immediate; which means within due and convenient time. *Dr. Bettefworth v. Bell*, Burr. 1875.

When returnable.

The writ of *habeas corpus*, being a prerogative writ, lies by the common law to any part of the king's dominions. for he ought to have an account why any of his subjects are imprisoned. 1 Rol. Abr. 69. Cro. Jac. 543. It lies to Jersey and Guernsey, Vent. 347. Sid. 386.; to Berwick and to counties palatine, Latch. 160. 3 Keb. 279.; and to the marshes of Wales, as it does to all other courts which derive their authority from the king, as all the courts exercising jurisdiction within his dominions do; and that it being a prerogative writ, does not come within the rule *brevia domini regis non currunt*, &c. for that must be understood of writs between party and party. 2 Rol. Abr. 69, *Wetherley v. Wetherley*.

To what places it lies.

But an *habeas corpus ad faciendum et recipiendum* does not lie to the cinque ports at the suit of the subject. *Vide* Bac. Abr. and authorities there cited, 3 vol. 4.

We will consider the several uses of this writ:—

D. 1. In removing a Prisoner from one Gaol to another.

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B b

D. 2. In

D. 2. In bringing up a Prisoner for the Purpose of his being surrendered in Discharge of his Bail.

D. 3. In removing a Cause from an inferior to a superior Court.

D. 1.

D. 1. Of the *Habeas Corpus* for removing a Prisoner from one Gaol to another.

How if defendant wishes to remove to King's Bench or Fleet, from a prison of inferior court;

If the defendant is a prisoner in any inferior court upon any cause of action there, and he wishes to be removed to the King's Bench prison or Fleet, he may, in the first instance, sue out this writ, which removes the body with the cause, as will be presently more fully shewn, *post*, **D. 3.**

or in custody of sheriff.

If he be in custody of the sheriff upon process out of K. B. or C. B. by suing out this writ, directed to such sheriff, his officer must bring up the defendant before the judge, who will commit him to the Marshalsea or Fleet, as the action may be.

How if defendant wants to be removed from K. B. to Fleet, or vice versa:

If the defendant be in custody of a sheriff upon process from the Common Pleas, and is desirous of being carried to the King's Bench prison, or *vice versa*, he must first get some *other* creditor to make affidavit of a debt above 10 l. to issue out a new writ thereon, and to leave it with a *habeas corpus* at the proper sheriff's office; upon the return of which, the sheriff's officer takes the defendant before some judge of the court whence such last writ issued, who will commit him to the proper prison of the court.

used also by plaintiff to remove defendant.

This also is the writ for the plaintiff in the action to remove defendant from the custody of the sheriff to the prison of the court.

Necessity thereof in some cases suspended by 4 and 5 W. & M.

Formerly when a defendant was in custody of sheriff on mesne process, for want of bail the plaintiff was *obliged* to sue out this writ, and have him committed before he could declare against him; and if he did not remove him within two terms from the arrest, defend

ant was entitled to his discharge. But by the statute of 4 & 5 W. & M. plaintiff may now declare against defendant whilst in custody of the sheriff. See *ante*, ch. 15. sec. 3.

This statute was only intended in case of plaintiffs, and not to take away the common law remedy, so that still they may sue out this *habeas corpus*, and at any time remove defendant from custody of sheriff into the prison of the court, either before or after declaration. Dr. *Bettefworth v. Bell*, 3 Burr. 1875. Intent of that statute.

[For form of this writ of *habeas corpus ad faciendum et recipiendum*, see *Appendix U.*]

Get blank writ at stationer's; fill it up; get it signed and sealed; take it to proper sheriff's office, in whose custody defendant is; he will make his return, and give warrant to his officer to bring the prisoner up before one of the judges of the court to be committed. How sued out.

Any judge of the court may commit him, though writ is returnable before the chief-justice.

The warden or marshal must obey the *habeas corpus*, though the party refuses to pay his fees, for he has a remedy for them. *Hopman v. Barber*, 2 Str. 814. But the judge, when the prisoner is brought up, will not make an order for him to be turned over till the fees are paid. Str. 308. Must be obeyed by officer, tho' fees not paid.

One shilling per mile is the usual charge for bringing defendant from a country gaol. Fees of the officer.

When defendant is committed, he must stay two days at least in the custody of the gaoler to whom he is committed, notwithstanding any other writ of *habeas corpus* sued out. R. Mich. 1654. Must stay two days at least in custody on the writ.

D. 2. Of removing Prisoners to surrender in Discharge of Bail.

D. 2.

When defendant is in custody of any sheriff at the suit of another, or otherwise, and his bail wish to surrender

render him, they may have this writ of *habeas corpus* for that purpose.

How to proceed therein, see vol. I. ch. 4. sec. 6.

D. 3.

D. 3. Of the *Habeas Corpus* to remove a Cause from an inferior Court.

D. 3. a. *What Causes may be removed, and when.*

D. 3. b. *Of the Operation of the Habeas Corpus.*

D. 3. c. *Of the Return thereto.*

D. 3. d. *Of Bail on Habeas Corpus.*

D. 3. e. *Of Declaring, Pleading, &c.*

D. 3. f. *Of the Procedendo.*

D. 3. a.

D. 3. a. *What Causes may be removed, and when.*

Of statute 21
jac. I. limiting
the action to 5l.

By 21 Jac. I. c. 23. s. 4. it is enacted, "That if any action or suit not concerning any freehold or inheritance, or title of lands, lease, or rent, be commenced or depending in such inferior court of record, it shall appear or be laid in the declaration, that the damages, or things demanded, do not exceed 5*l.* then such action or suit shall not be stayed by any writ whatsoever, other than writ of error or taint."

To what courts
it extends.

And by sec. 6. it is provided, "That this act shall extend only to such inferior courts of record, and so long time only as there shall be an utter barrister of three years standing at the bar of the four inns of court, steward or under-steward, town-clerk, judge, or recorder of such inferior court, or assistant to the judge or judges of the same, as shall not be an utter barrister of that standing, and there present, and not counsel in any action or suit there depending."

Barrister must
be present.

Such barrister must at all events be present at trial, otherwise the trial will be void, and the cause removed by *habeas corpus*. *Fanley v. Mr. Connell*, B. 515.

In order to evade the above statute, it was usual for defendants when the real cause of action was under 5*l.* to set up a fictitious action against themselves of a pretended demand of above that sum, and then bring an *habeas corpus* thereon, by which writ *all* causes against them in the court below were removed, and therefore of course the smaller action, to the prejudice of many poor plaintiffs, who for want of means to carry on a suit in the superior court, were obliged often to desist from prosecuting, and submit to the loss of their demands.

How above statute was evaded.

But by 12 Geo. 1. c. 29. s. 3. to prevent such practices in future, it is enacted, "That the judges of such inferior courts of record, as are described in the statute of Jac. 1., may proceed in such actions commenced, as are therein specified, which appear or are laid not to exceed the sum of 5*l.* although there may be other actions against such defendant, wherein the plaintiff's demands may exceed the sum of 5*l.*

Afterwards remedied by 12 Geo. 1. c. 29.

So that now the cause of action must be above 5*l.* to be removed.

How the law now stands.

No action can be removed, which is only maintainable in the court below, as being founded upon any special custom of the place. Such as against a *feme covert* as sole trader, brought in the mayor's court upon the custom of London. *Pope v. Vaux & Ux.*, 2 Blac. 1060.

What actions are not removable.

Or an action there for calling a woman a whore. *Watson v. Clerk*, Car. 75.

If therefore a *habeas corpus* issue, the court, upon such special matter being shewn in the return, will grant a *procedendo*, lest plaintiff should otherwise lose her action.

At common law there was no particular limitation as to the time when a cause might be removed. The consequence was, that many abused this privilege; for a defendant might secretly sue out a writ of *habeas corpus*, keep it in his pocket till issue was joined, the jury sworn, and the plaintiff had actually given his evidence; and then

Of the time of removing the cause.

then produce the writ and supersede all further proceedings; by which means he knew the strength or weakness of his adversary's case, and had an opportunity of preparing his defence accordingly, when the cause came to be tried in the court above.

How regulated
by 43 Eliz. c. 5.

But to prevent this abuse the 43 Eliz. c. 5. enacts,
 " That no writ of *habeas corpus*, or other writ sued
 " forth by any person whatsoever, out of any of her
 " Majesty's courts of record at Westminster, to remove
 " any action, suit, plaint, or cause, depending in any in-
 " ferior courts, having jurisdiction thereof, shall be re-
 " ceived or allowed by the judges, or officers of such
 " court, wherein or to whom such writs shall be de-
 " livered (but they may proceed therein as if no such writ
 " were sued forth or delivered); except that the said
 " writ or writs be delivered to such judges or officers
 " of the said court, before that the jury which is to try
 " the cause in question, and the party that sued forth
 " the said writ, or for whose benefit it was sued forth,
 " have appeared, and one of the said jury sworn to try
 " the said cause."

Defects of that
statute.

This statute did not however effectually remedy the evil; parties often stayed till the last moment of trial, before the *habeas corpus* was produced, and this harassed the suitors and occasioned unnecessary expence. The legislature again interfered, and by the 21 Jac. 1. c. 23. f. 2. enacted, " That no writ of *habeas corpus*, *certiorari*,
 " or other writ sued forth, to remove any action or suit
 " commenced in any inferior court of record, having ju-
 " risdiction thereof, shall be allowed by the steward,
 " judges, or officers thereof, unless delivered before issue
 " or demurrer joined in the said cause so depending, so
 " as the said issue or demurrer be not joined within
 " six weeks next after the arrest or appearance of the de-
 " fendant to such action or suit."

Explanation of
the two above
statutes.

The statute 21 Jac. may at first view appear rather contradictory of the statute of Elizabeth, but they are perfectly compatible. If issue or demurrer be joined within six weeks from the arrest or appearance, *habeas corpus* may issue any time before one of the jury is sworn on the trial, according to 43 Eliz. But if the parties wait six weeks before they join in issue or de-
 murrer,

murrer, no *habeas corpus* can afterwards remove the cause. Besides which, the statute of Elizabeth extends to all inferior courts; that of James mentions courts of record.

There seems some contradiction in the case of an *habeas corpus* after interlocutory judgment: no notice is taken thereof in either of the statutes. In the case of *Wyatt v. Markham*, Prac. Reg. 217. Bar. 221, it was held too late after interlocutory judgment; but in *Cox v. Hart*, Burr. 759, an *habeas corpus* after interlocutory judgment, but before executing inquiry, was held well, and the practice was said to be to receive such writs any time before one of the jury were sworn.

How where *habeas corpus* issues after interlocutory judgment.

D. 3. b. Of the Operation of the Habeas Corpus.

D. 3. b.

The writ of *habeas corpus*, immediately upon being sued, suspends the power of the inferior court; and if they proceed afterwards, the proceedings are void and *coram non judice*, 1 Salk. 352. Cro. Car. 261. 2 Jones, 209. 2 Mod. 195.; that is, provided the writ was delivered to the proper officer within the time, according as the case is to be governed by statute of Elizabeth or of James, as above mentioned; otherwise the court may proceed. Bar. 221, *Hornbuckle v. Eaton*.

How it suspends proceedings in courts below.

The writ operates from the delivery, not from the teste.

D. 3. c. Of the Return to the Writ.

D. 3. c.

A return must be made to the first writ of *habeas corpus*, or an attachment may issue immediately, without any *alias* or *pluries* writ; notwithstanding what may be found in the old books upon the subject. *Per* Buller, J. in the *King v. Winton*, 5 D. & E. 91.

Return to be made to first writ.

The writ must be returned by the same person to whom it is directed; and where the writ was awarded to a sheriff, who before the return left his office, and a new sheriff was made, who returned *languidus*, the court held the return not good; but it ought to be returned by the two sheriffs; by the old sheriff that he had the body, and had delivered it to the new sheriff; and then the

By whom returned.

new sheriff might have returned *languidus*. *Puck v. Gressett*, Pasf. 26 Car. 2.

What to be returned.

The record itself is not removed by *habeas corpus* as it is by *certiorari*, but remains below; and the return is only a history of the proceedings. The return therefore may be filed, and afterwards a *procedendo* may issue, because it will not send out any record filed which could not be done, but will only remove the suspension, Salk. 352.

When return to be general, when special.

Where an *habeas corpus* is properly sued out, so as to suspend the proceedings, it is sufficient for the party to whom it is directed, to return *generally* the cause for which the party is in custody with the body; but where the *habeas corpus* is irregular, or the court proceeds afterwards, they must return the whole *special matter*.

Or the person to whom it is directed will be in contempt. Carth. 69.

Declaration should be returned.

The declaration itself ought to be returned that the court may see what the cause of action is. If the *habeas corpus* is delivered before the plaintiff has declared, he ought immediately to enter his declaration, that it may be returned upon the writ. *Watson v. Clerk*, Car. 75.

If the cause of action is under 10 *l.* and defendant does not enter into a recognizance agreeable to 19 Geo. 3. c. 70. which see *post*, ED. 3. d. it is proper matter to be a special return. *Staines v. Grant*, East. 22 Geo. 3. 2 Crom. 402.

If return insufficient.

If the return be insufficient, court will sometimes allow it to be amended, Carth. 75.

How for return amendable.

The lord mayor, aldermen, and sheriffs of London, moved to amend their return of defendant's writ of *habeas corpus cum causâ*. The substance of the return was the action between the said parties in debt for the penalty of a *bye-law* brought against defendant for employing a *foreigner* (no freeman of the city), and the custom to make *bye-laws*; but the custom to employ freemen, and not foreigners, within the city was omitted; which last mentioned custom it was prayed might be

be inserted in the return. For defendant, it was submitted whether the return was amendable or not, especially as another rule touching the granting of a *procedendo* was pending. But the rule to amend the return was made absolute. *Harrison, Chamberlain of London, v. Potter, Barnes, 23.*

An *habeas corpus cum causa* went to the portreeve of Yeovil in Somersetshire, who returned, *that before the coming of the writ the party was bailed*; and the plaintiff's counsel moved for a better return; and it was ruled, that he should make a better return; for though the body be bailed, he ought to return the cause—and the body cannot be bailed after the writ received. *Salmon v. Slade, Hil. 25 & 26 Car. 2. 2 Crom. 402.*

An *habeas corpus* went to the *stannary* court, to which an insufficient return was made, and therefore disallowed. *Et per Cur.* The warden of the stannaries must be amerced, and you may go to the coroners and get it affeered, and estreat it; and an *alias habeas corpus* must go for the insufficiency of the return to the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment. *Salk. 350. pl. 8.*

Of punishment for insufficient return.

If defendant sues out *habeas corpus*, and from his own irregularity when the cause is brought up he is remanded, plaintiff will be allowed his costs to be taxed, and to be inserted in the rule to remand him, and gaoler to detain him until the costs be paid. *Staines v. Grant, 2 Crom. 402.*

Of the costs.

D. 3. d. *Of Bail on Habeas Corpus.*

D. 3. d.

By an old rule of court, whenever bail is required in the court below, bail must be put in in the court above, upon removing the cause by *habeas corpus*. *R. Hil. 2 Jac. 2.*

When required.

Before the statute of 19 Geo. 3. c. 70. this rule was very necessary, because persons could at that time be held to bail in actions in an inferior court for 40*l.* but in the superior courts not under 10*l.* So that unless the above regulation had been made, the defendant by removing

removing the cause, if above 40*l.* but under 10*l.* might have discharged his bail, and deprived the plaintiff of that security which he had in the court below. But since the passing of that statute the efficacy of the above rule ceases; for now, as no one can be arrested and held to special bail in an *inferior court*, without an affidavit made and filed, that the cause of action amounts to 10*l.* or upwards, which is the same sum for which defendant may be held to bail in the courts above, it cannot be of advantage to the defendant, so far as regards his giving bail, to remove his cause into a superior court.

Of the recognition below, in case no bail required above.

But although bail above is not required, unless the cause of action amounts to 10*l.* yet, to discourage the removal of causes merely for delay, which is too often done to harass the plaintiff, the same statute provides, "That no action in an inferior court, not amounting to 10*l.* or upwards, shall be removed by *habeas corpus*, &c. unless the defendant shall enter into a recognition, with two sureties, in the court below, in double the sum for which the action is brought, for payment of the debt and costs, in case judgment shall pass against him."

Bail not to be put in till *habeas corpus* returned.

No bail to be tendered, or put in upon an *habeas corpus*, until the *habeas corpus*, and the cause for which bail is to be put in, be returned, to the end that it may appear for what cause the defendant is detained, and bail may be taken, and the *habeas corpus* and bail duly filed. Mich. 1654. Pas. 29 Car. 2. Hil. 16 W. 3.

Habeas corpus to remove a cause out of an inferior court, and on search, plaintiff's attorney found bail; but the *habeas corpus* not being returned and filed, the bail signified nothing, and therefore he carried the cause back by *procedendo*, of which defendant complained to the court, but it was ruled, that the defendant cannot put in bail till the *habeas corpus* be returned. *Masters v. Bruges*, Mich. 20 Car. 2. Defendant therefore, if he wishes to put in bail, must first apply to the sheriff for a return to *habeas corpus*.

Of compelling defendant to put in bail.

A defendant who has removed a cause from an inferior court into B. R. or C. B. is not of course obliged

liged to put in *special bail* there; but it lies with the plaintiff to compel him so to do. In order therefore to get bail to the action, the plaintiff, immediately as he discovers that the cause is removed, should obtain a rule of court, or order from one of the judges of the court, for a *procedendo* to remand the cause, unless good bail be put in within *four days* next after notice of the rule (if in term), or within *six days* next after notice of the rule (if in vacation), and then serve a copy of such rule or order on the defendant or his attorney; and unless bail be put in accordingly, a *procedendo* may be had.

May 20th, 1742, an *habeas corpus*, returnable immediately, was lodged at the *palace court*, to remove a plaintiff into C. B. and nothing further was done in it till the 20th of Nov. when the plaintiff served the defendant with a rule to put in bail. Defendant insisted, that the plaintiff should have served such rule within *two terms* after the *habeas corpus* brought, and was now too late. But the court held, that if the defendant had put in bail upon the *habeas corpus* without staying to be forwarded by a rule for bail; and the plaintiff had not declared within two terms after bail put in, the cause would then have been out of court; but the rule for bail is not limited to any particular time: accordingly, the rule to shew cause why proceedings should not be stayed, was discharged. Barnes, 90.

Within what time plaintiff must do this.

How to put in bail.

If *common bail* only is necessary, the attorney for the defendant fills up a common bail-piece to the *habeas corpus* and return, and files the same at the judge's chambers on the return of the rule, and gives notice of having filed the same to the plaintiff's attorney.

If common bail.

If *special bail* is required, the defendant, upon service of the rule for bail engrosses a bail-piece *, and annexes the same to the *habeas corpus* and return; and then takes the bail to the judge's clerk, who will take their acknowledgment, and then notice thereof must be given to the plaintiff's attorney.

If special bail.

* Form of bail piece is the same as in other actions, only it states "A. B. is delivered on bail upon *habeas corpus*." The recognizance also is the same as in other cases.

In

Of putting in
bail *de bene esse*.

In B. R. if bail be taken in the absence of the plaintiff, or his attorney, the same is taken *de bene esse*; and if, on due notice in writing of the names and places of abode of such bail, the time when put in, and before whom, no exception thereto be taken by the plaintiff in *twenty-eight days* after the putting them in, the bail-piece shall then be filed within *four days* next after the end of the *twenty-eight days*. Mich. 16 Car. 2.

Of excepting
thereto.

In C. B. if bail be taken *de bene esse*, and on notice being given of the names and places of abode of the bail, the time when put in, and before whom, no exception thereto be taken in *twenty days*, the bail-piece shall be filed within *four days* next after the expiration of the *twenty days*. Hil. 13 & 14 Car. 2.

And unless the bail, in case of no exception within time, be not filed within the *four days*, a *procedendo* may be granted upon a certificate that the bail is not filed. Same rules.

Of compelling
defendant to
justify his bail.

If the plaintiff dislikes the bail put in, he serves the defendant's attorney with another rule or order for a *procedendo*, unless better bail be put in within *four days* after service thereof, whether it be in term or vacation.

Of the service of
the rule in va-
cation.

If this rule is served in *vacation time* in B. R. the practice is, for the defendant's attorney to give notice only within the rule, that the bail will justify on the first day of the ensuing term.

But on service of such rule in *vacation time* in C. B. it is usual to justify within the four days before a judge at his chambers, for which 2 s. is paid; and on the first day of the ensuing term justify in court.

How if bail do
not justify in
time.

A cause was removed by *habeas corpus* in vacation time, and the bail put in on the removal ought to have justified on the first day of the ensuing term (a rule having been served on the defendant for a *procedendo*, unless better bail), and the bail not having offered themselves the first day of the term, a *procedendo* was sued out to remand the cause. On the second day of the term, the bail came and offered to justify, but were then too late; however, a rule was obtained to shew cause,

cause, why the *procedendo* should not be set aside: but on shewing cause the rule was discharged, for it was said, that should this rule be made absolute, it would operate as a second *habeas corpus*, which can never be granted after a cause is once remanded by a *procedendo*. Anon. B. R. 1778. The counsel offered to pay costs of the *procedendo*, but nevertheless the court discharged the rule.

If a cause is removed by *habeas corpus* out of the Marshalsea, or other inferior court (London excepted), and the bail below offer to be bail above, the plaintiff cannot except to them, but is compellable to take them, because he might but did not except to them below. But it is otherwise in a cause from London, for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff has not the liberty of excepting against them, and the clerk is not responsible if they be deficient in the court above, though he was in London. Salk. 97.

How if same bail below become bail above.

When bail is taken of a prisoner in custody the judge's clerk in C. B. is to deliver the bail to the *prothonotary* to be filed, if assented to; and for that purpose the *prothonotary's* fees are to be deposited; but the prisoner is not to be discharged until the bail be assented to, or the plaintiff over-ruled in the open court to accept the same upon examination. Mich. 1654. Hil. 13 & 14 Car. 2.

Of bail when defendant is a prisoner in custody.

If the defendant is an actual prisoner in an inferior court, and brings an *habeas corpus* to remove the action into a superior court, the *habeas corpus* will not discharge him out of custody till bail is put in above and perfected; therefore it is the better way to gain the defendant his liberty to put in bail below, and then to remove the cause into the superior court, if he would have it there determined.

An action was brought in the sheriff of London's court against two partners, one brought an *habeas corpus*, and put in bail for himself only. And a *procedendo* being moved for, it was granted: for otherwise, the plaintiff would be disabled to go on in either court. Fry v. Carey, Str. 527.

How if only one of two defendants put in bail.

If

If one be removed into B. R. by *habeas corpus*, and puts in bail, the bail are liable to all other actions, as well as that for which they become bail, at the suit of the same plaintiff mentioned in the return of the *habeas corpus*, wherein he shall declare against the said defendant within two terms next after: but see the next case.

Of the extent of the liability of the bail.

The defendant was arrested by process out of an inferior court, in a *plea of trespass on the case*; bail was given, the plaintiff declared, and the cause was removed by *habeas corpus*; and then the plaintiff delivered two declarations, one for words, the other upon an *assumpsit*. *Per Hale*: If a plaintiff has declared before the *habeas corpus* delivered, the bail shall be special only as to that action, and shall be common to the other: but if no declaration before *habeas corpus*, then the bail put in upon the *habeas corpus* shall be special bail to all actions of the plaintiff against the defendant of that term; and the plaintiff cannot declare before *habeas corpus* allowed. *Serle v. Newton*, Hil. 25 & 26 Car. 2.

The practice in other respects as to notices of bail, exception thereto, and justifying bail on *habeas corpus*, is the same as in other cases, for which refer to vol. I. ch. 4. sec. 5.

D. 3. e.

D. 3. e. Of Declaring, Pleading, &c.

Plaintiff must declare *de novo*.

In civil cases, the record itself is never removed by *habeas corpus*, but remains below; therefore the plaintiff must declare *de novo*; and the declaration is exactly the same as in other cases: and if in B. R. he is stated to be in *custodia mareschalli*. *Salk.* 352.

When he must declare.

The plaintiff must declare before the end of the second term after the return of the *habeas corpus*, otherwise the defendant is not bound to accept a declaration. And note, If the *habeas corpus* is returnable in term, that term is one; and the plaintiff must declare before the end of the succeeding term. *Hutton v. Stourbridge*, Stra. 631.

According as bail is put in.

There is no limited time for the plaintiff's getting an order for a *procedendo*, unless bail be put in. *Barnes*, 90. But

But if the defendant puts in bail in time, and the plaintiff does not declare in two terms, the cause is out of court.

If a cause is removed by *habeas corpus* out of the courts of Canterbury, Southampton, Hull, Litchfield, Pool, or other counties, where the judges of *nisi prius* seldom go, if the action be transitory, it must be laid in the county of Kent, Hampshire, Yorkshire, Staffordshire, or Dorsetshire, or other county in which such city or town lies, and the recognizance is to be taken accordingly. Mich. 1654.

Of the venue in the action.

When a defendant has removed his cause into the superior court, and perfected his bail, he cannot sign a *non pros* for want of a declaration, as the plaintiff is not in court till he has declared, and the cause is supposed to be removed against his inclination. *Davis v. James*, 1 D. & E. 372.

No non pros for want of declaration.

The plaintiff cannot declare *de bene esse*; for the several rules, which permit a plaintiff to deliver his declaration *de bene esse*, apply only to such actions as have their commencement originally by process, issued out of the court above; but if a cause be removed, plaintiff must stay until defendant is fully in court and declare in chief. Ni. Pri. 10 W. 3. K. B.

No declaring *de bene esse*.

The difference between an *habeas corpus* in a criminal and civil case, is apparent. For if one be in custody, and indicted for some offence in an inferior court, there must, beside the *habeas corpus* to remove the body, be a *certiorari* to remove the record; for as the *certiorari* alone removes not the body, the *habeas corpus* alone removes not the record itself; but only the prisoner with the cause of his commitment. And therefore, though the court, on the *habeas corpus* and return, can judge of the sufficiency and insufficiency of the return and commitment, and bail, or discharge, or remand the prisoner, yet they cannot upon the bare return give any judgment, or proceed upon the indictment, order, or judgment, without the record itself be removed by *certiorari*; the same stands in the full force it did, though the return be adjudged to be insufficient, and the party discharged of his imprisonment; and the court below may issue new process

Difference of *habeas corpus* in criminal and civil proceedings.

process on the indictment. Whereas an *habeas corpus* in a civil case suspends the power of the court below, and if they proceed afterwards, their proceedings are *coram non iudice*.

But after bail are put in above, plaintiff may declare *de bene esse* before they *justify*. Imp. K. B. 623.

Of the time for pleading in bar.

The time for pleading is the same as in other cases; namely, four days, if defendant lives within twenty miles of London; if above that distance, eight days. There are many old cases in the books, which seem to contradict this practice, but they were before the rules of court of 5 & 6 Geo. 2. in B. R. and Mich. 3 Geo. 2. in C. B. by which the time is now regulated.

No imparlance.

No imparlance is allowed upon a *habeas corpus*, although declaration be not delivered the same term *habeas corpus* is brought. Imp. K. B. 623. 1 Will. 154.

Of pleading in abatement.

Pleas in abatement must be within the four days as in other cases.

Coverture when pleadable.

Debt against a *feme sole* in the palace court, and after appearance and plea pleaded she married, and then removed the cause by *habeas corpus*; and after the plaintiff had declared against her above, she pleaded her coverture in abatement, viz. that she was married at the time the *habeas corpus* sued out: and it was ruled a good plea, for the proceedings are *de novo*, and the court takes no notice of the proceedings below. But the court said, that if this matter had been moved on the return of the *habeas corpus*, they would have granted a *procedendo*; for though an *habeas corpus* be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. 1 Salk. 8.

Defendant, whilst a *feme sole*, was arrested in the palace court; and a day or two after the arrest married, and then removed the plaint by *habeas corpus* into C. B. and pleaded her *coverture in abatement*. Whereupon plaintiff obtained a rule to shew cause why the plea should not be set aside, which, on hearing counsel, was made absolute. Barnes, 355, *Haddorte v. Howard*.

The

Sec. III.] HABEAS CORPUS.

The proceedings subsequent to the declaration, are the same as in other cases.

D. 3. f. Of the *Procedendo*.

D. 3. f.

If the defendant, upon removing a suit commenced against him by *habeas corpus*, does not comply with the statutes and rules of court made to regulate the proceedings therein upon such removal, as by *not putting in bail, where special bail is required; or not justifying bail in due time, when served with a rule; or not pleading in due time to the declaration delivered, or the like;* the plaintiff may obtain a *procedendo*, and get the cause remanded.

If the defendant does not comply.

A *procedendo* is a writ grantable by any judge of the court into which the cause was removed, upon application to one of their clerks at chambers. Which, when engrossed on a two shilling stamped piece of parchment, must be signed and sealed. The writ is to this effect:

"GEORGE the Third, by the grace of God, &c.
 "To the sheriff of or judges, &c. (stiling
 "the court and judges thereof properly), greeting.
 "Although we lately by our writ commanded you, that
 "you should have the body of C. D. detained in our
 "prison under your custody, as it was said, under the
 "safe and secure conduct, together with the day and
 "cause of his being taken and detained, by whatsoever
 "name the said C. might be called, in the same, before
 "our right trusty and well-beloved Lloyd lord Kenyon,
 "our chief justice assigned to hold pleas before us, at
 "his chambers, situate in Serjeant's Inn, Chancery-
 "lane, immediately after the receipt of that writ, to
 "do and receive all and singular those things which our
 "said chief justice should then and there consider of
 "him in that behalf; yet we, being now moved with
 "certain causes in our court before us, command you
 "and every of you, that in all complaints or suits against
 "the said C. at the suit of A. B. in our court before
 "you, or any of you levied or affirmed, or before you
 "or any of you now depending undetermined, you
 "proceed with what speed you can in such manner,
 "according

“ according to the law and custom of England, as you
 “ shall see proper. Our said writ to you thereupon
 “ first directed to the contrary in any thing notwith-
 “ standing.

“ Witness, &c.

[Stormont and Way.]

For which a *prcipe* is made for the office as follows:

Middlesex, *Procedendo* for J. S. against G. H.

T. S. attorney.

Upon carrying the writ of *procedendo* to the secondary of the court to which it is directed, and filing it, the court instantly re-assumes the jurisdiction of the cause. And as the writ of *habeas corpus* removes all causes that were in the court, against the defendant, so the writ of *procedendo* remands all back again.

Care must be taken that the *habeas corpus* and *procedendo* are directed properly to the inferior courts. [For [Appendix E.] which directions, see *Appendix E.*]

After interlocutory, and before final judgment in an inferior court, an *habeas corpus cum causa* was brought; before the return of the writ the defendant died, and a *procedendo* was awarded; because, by the 8 & 9 W. 3. c. 11. the plaintiff may have a *scire facias* against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable. Salk. 352.

By the stat. 21 Jac. 1. c. 23. sec. 3. whenever the action is remanded back to the inferior court by writ of *procedendo* or other writ, the said action shall never afterwards be removed or staid before judgment by any writ out of any court whatever.

If after a *procedendo* to carry back a cause to an inferior court, the plaintiff recover and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into K. B. by *habeas corpus* the court will award a *procedendo* in the suit against the bail.

bail; for the proceeding by *scire facias* is merely an attendant on the original cause, and ought to be in the same court as the original action. *Dixon v. Heslop* and another, 6 D. & E. 365.

SECTION IV.

Of Proceedings in Outlawry.

Outlawry is a punishment inflicted on a person for a contempt and contumacy, in refusing to be amenable to, and abide by the justice of that court which hath lawful authority to call him before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so doth it subject the party to divers forfeitures and disabilities; for hereby he loseth *liberam legem*, is out of the king's protection, &c. Co. Lit. 128. Rol. Ab. 802. Dr. and Student, dial. 2. c. 3.

Outlawry what.

With respect to the forfeitures for refusing to appear, the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and, without requiring further proof or satisfaction, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his whole estate, *real and personal*.

Forfeitures incurred thereby.

In criminal cases.

But outlawry in lesser crimes, or in *personal actions*, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, but yet it is very fatal and penal in its consequences; for hereby he is restrained of his liberty if he can be found, forfeits his goods and chattels, and the profits of his lands, while the *outlawry* remains in force. Plow. 941. 9 H. 6. 20. b.

In civil cases.

Outlawry lies either upon *mesne* process, or after judgment upon *judicial* process. In the former it is to compel an appearance to the suit; in the latter to procure satisfaction of the judgment: and in *civil* actions it is considered as in the nature of civil process. The forfeiture,

Nature of outlawry in civil cases.

feiture, though nominally to the king, yet in truth goes to the plaintiff towards payment of his demand. If the outlaw appears, pays all the costs, puts in sufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if *after* judgment, the outlaw pays the debt and costs, the court reverses the outlawry upon motion without any writ of error. The form of the reversal is—"For the errors *assigned* and other *errors appearing upon the record*," although in truth there is no error at all. Burr. 2549.

Having shewn the general nature of outlawry in criminal and civil cases, we will now confine ourselves to the proceedings in outlawry in *civil actions*, and consider:—

A. In what Cases Outlawry may be necessary.

B. In what Actions and against whom it lies.

C. Of the Process to Outlawry; and herein of the original Writ, the Exigent, Allocatur, and Proclamation.

D. Of obtaining Satisfaction against the Outlaw by *Capias Utlagatum* against his Person, or special *Capias Utlagatum* against his Person, Chattels, and Lands.

E. Of the Appearance of Defendant upon the Exigent, or after Outlawry, and the Reversal thereof by Motion or Writ of Error.

F. Of Declaring after Outlawry reversed or superseded.

G. Of Restoration after Outlawry reversed or determined.

H. Of the Outlawry after final Judgment.

2. In what Cases Process to Outlawry may be necessary.

3.

If a debtor absconds, or secretes himself so that plaintiff cannot arrest him, and if he has goods or estates within the realm, it may be advantageous for the plaintiff to resort to the process of outlawry, which will either compel his appearance, or enable plaintiff to obtain satisfaction from his chattels or land.

If defendant absconds or secretes himself.

So, if it be a joint action against many defendants, and some or one of them cannot be found, it is necessary for plaintiff to proceed to outlawry against him or them; for he cannot declare against the rest until all are in court. 1 Str. 473. 1 Will. 78.

Or if one defendant in a joint action cannot be found.

In which case, in order to prevent the bail from being discharged, or the other defendants, if prisoners, obtaining a *superfedeas*, take care, before the end of the second term from the return of the writ, to get a rule to declare against such defendants, serve it on the attorney, and take out such rule from term to term till the other defendants come into court or are outlawed; when this rule is applied for, tell the clerk of rules that you are proceeding to outlawry, as it may be drawn up specially accordingly.

In which case rule to declare should be taken out.

When the outlawry against such defendants is complete, declare against all, and intitle the declaration, the term when the outlawry is complete, and not of the term the first writ is returnable. 1 Will. 78.

How declaration to be intitled.

Upon a bill of Middlesex against two, one only puts in bail, and the other could not be found, plaintiff then issued out an original against both, and outlawed both. *Per Cur.* Though you could not proceed on the bill of Middlesex, and though it was necessary to join the other, who could not be arrested with the defendant, in the same original, yet you could not go on to outlawry against him; you should have outlawed one only, and when you might have come in and declared upon the original, that A. together with B. his late partner *sumpsit super se*; but the proceeding here is altogether

How if both be outlawed when one has appeared.

gether irregular, because the party was in court, and has done every thing in his power to put the plaintiff in a fair way of recovering his debt; he could not appear or file bail for the other partner, because an action would lie against him for doing it without authority. The court ordered the outlawry to be reversed, and plaintiff to pay costs. *Edwards v. Carter* and another, Str. 473.

15.

15. In what Actions and by and against whom it lies.

Outlawry lies where *capias* lies.

In all actions where a *capias* lies, plaintiff may proceed to outlawry.

In what actions at common law.

By the common law, a *capias* was the process in all actions of trespass *quare vi & armis*; herein therefore process of outlawry lay by the common law.

In what by statute.

But in account, debt, detinue, annuity, covenant, replevin, no *capias* lay at common law, but only summons and distress infinite, and therefore the *capias* and outlawry in these actions were introduced by divers acts of parliament.

Against whom outlawry lies.

In civil actions between party and party, a *capias* or *exigent* does not regularly lie against a lord of parliament of England, whether secular or ecclesiastical. 3 Bac. Ab. 750.

Not against a peer;

nor an infant under fourteen.

Nor against an infant under the age of fourteen; but such outlawry is not void, only voidable on writ of error. *Ib.*

Against women, who are called waived.

Outlawry lies against a woman, whether a *feme covert* or *sole*, as the case may be; but a woman is not said to be outlawed but to be *waived*, and if the return to the exigent be, that she is outlawed instead of waived, it would be error. *Ib.*

Why.

The reason of this distinction is said to be, because women are not sworn in leets or tourns as men are; men therefore are called *utlagati*, i. e. *extra legem positi*.

but women are *waiviatæ*, i. e. *derelictæ*, left out or not regarded, because they are not sworn to the law. Co. Lit. 122. b.

C. Of Procefs to Outlawry.

C.

Procefs to outlawry lies in no case but where a *capias* lies. Lies only where *capias* lies.

So that, when the proceedings are by *bill*, as there can be no *capias* upon a bill, so there can be no procefs of outlawry. Leon. 329. Sid. 159. Keb. 577. Not in proceedings by bill.

Nor can defendant be outlawed by procefs whether a *capias* or not, with an *ac etiam*. Nor on procefs with *ac etiam*.

Because the *capias* to warrant an outlawry must be the *capias* which is given as a procefs upon the original; the offspring of an original writ, and awarded only upon an actual or supposed disobedience thereto. No one, therefore, can be outlawed for any civil matter, unless the suit be commenced by *original*, and the *capias* is given as procefs upon the original. From the nature of the *capias* requisite.

So that not only in proceedings by bill, or by attachment of privilege, but also in those actions where the *summons* is the proper procefs upon the original writ, the defendant cannot be prosecuted to outlawry. Nor on original writ and summons.

The procefs to outlawry must therefore be by special original in K. B. and this whether the outlawry be to compel an appearance on *mesne* procefs, which is the most usual, or after judgment. But must be by special original.

But it may be either by special original, or common *capias quare clausum fregit*, in C. B.

But since the statute 12 Geo. 1. c. 29. we do not often hear of a defendant being outlawed by a common *capias quare clausum fregit*; because, if the plaintiff's cause of action does not warrant him to arrest and hold the defendant to bail, he is generally served with a copy of the procefs, with a notice subscribed to appear; and upon no appearance within *eight days* after the return

of the process, the plaintiff is at liberty, upon an affidavit made of the process having been duly served on the defendant, to enter an appearance for him, and proceed as if he had regularly appeared to the action. This method, therefore, in cases not warranting *bail*, if the defendant can be met with, being more easy and expeditious, and attended with little or no expence to the suitor, compared with proceedings towards *outlawry*, affords one reason why *outlawry* is not often heard of now upon *common capias* *quare clausum fregit*. Another and perhaps the chief reason is, that should a plaintiff proceed with an intention to *outlaw* the defendant upon *common capias*'s, and the defendant even not come in till after the *exigi facias*, he may, notwithstanding, reverse the *outlawry* had against him, without being compelled to put in *bail* to the action. So that the plaintiff, instead of gaining any advantage, in proceeding to *outlawry* upon *common capias*'s, and not pursuing the line chalked out by the statute for his own expedition, is not only put to expence, but is himself the occasion of his own delay, and frequently in a worse situation towards recovering his demand than he otherwise might have been, if he had proceeded as the statute directs him. 2 Crom. Prac. 34.

As a fine is paid to the king on suing out an original, and the expences are increased by the proceedings, the costs of such action are of course greater, but the court of K. B. only allow *common* costs, unless the debt be 50*l.* or upwards.

How to proceed.

The *præcipe*.

[Appendix L].

Make out *præcipe* for original, which, in an action on the case, or of trespass, must recite the whole cause of action as in a declaration. [For the form thereof, see Appendix L]. See also proceedings by special original, ch. 5. sec. 1.

Take *præcipe* to the *filazer*, whether in B. R. or C. B. who will make out *capias*, *alias* and *pluries*.

If the *præcipe* is carried to the *curstor*, before the *essoign* day of the term, he will make the original returnable on any return of the precedent term. The original is returned of course thus:

Pledges for prosecuting, { John Doe.
Richard Roe.
Plaintiff

Plaintiff has no need to wait till the *capias* is spent, then to take out an *alias*, and endeavour to arrest the defendant, and after that a *pluries*; but he may, for expedition, get them all of the filazer at once (if there is time since the cause of action accrued to allow of the proper *teste* and *return* to each writ), and return them severally of course after this manner:

Capias, *alias* and *pluries* may be taken out together.

"The within named C. D. is not found in our bailiwick." The answer of

A. B. Esq. }
and } Sheriffs.
C. D. Esq. }

The original writ must have *fifteen days* at least, between the *teste* and return. The *capias* also must have *fifteen days* between its *teste* and return; and should regularly bear *teste* on the return day of the original: the *alias* also must have the same number of days, and should bear *teste* the return day of the *capias*; and the *pluries capias* must have the same number of days, and should bear *teste* the return day of the *alias*; whereas, if a plaintiff sues by original, and does not mean to proceed to *outlawry*, the *capias* may bear *teste* before the original, and even before the cause of action accrued, so long as it is actually taken out afterwards; for you cannot have oyer of the *capias*, so as to take advantage of it. Barnes, 173. And so held in B. R. East. 18 Geo. 3.

How tested, &c.

The proceedings are exactly the same towards *outlawry* upon a common *capias quare clausum fregit*, as on a *special capias*.

Same proceedings on common *capias*.

It has been often questioned, whether an *affidavit* was necessary to be made of the *debt*, when a plaintiff sues by *special original*, previous to the issuing of the process. But it was determined in lord Hardwick's time, M. 10 Geo. 2. *Forunes* and *Allen*, that process of *outlawry* is not within the stat. 12 Geo. 1. c. 29. so there is no need of an *affidavit*, when the plaintiff sues by *special original*, especially as the 5 Geo. 2. c. 27. s. 5. enacts, "That no special writ, nor any process specially therein expressing the cause of action, shall be sued forth or issued from any superior court, where the cause of action shall not amount to 10*l.* or upwards." Since which

Affidavit of debt not necessary on this process.

which statute, as no *special writ* can issue where the cause of action is not above 10*l.* it seems, that, before the issuing of a *special writ*, no affidavit is necessary; because a sheriff, if he apprehends the party either upon the *special capias*, *alias*, or *pluries*, before he lets him go out of his custody, for his own safety, should take bail; and he can easily know to what amount to take bail, as the whole cause of action is spread and set forth in the writ. Vide the case of *Cracraft v. Gledowe*, Burr. 4pt. 1482.

In C. B. it was held, that on process to *outlawry*, no affidavit for bail is required by statute, or the course of the court. Barnes, 322.

There can be no harm however in making an affidavit.

How to proceed when writs returnable.

When the *pluries writ* is returnable, get it from sheriff's office, file warrant of attorney for plaintiff, and get *pluries* marked by clerk of warrants; upon which an *exigent* and proclamation may be made out.

Of the *exigi facias*.

Upon the return therefore of *non est inventus* to the *pluries capias*, process of *outlawry* begins, which is the writ of *exigi facias*. In B. R. the *filazer* acts as the *exigenter*: in C. B. the *exigenter* is a distinct officer from the *filazer*.

The writ of *pluries capias*, when sealed and returned, is the warrant for the *exigenter* to make out the *exigi facias* and writ of proclamation thereon.

Warrant of attorney must be filed.

Every attorney shall file his warrant of attorney of the term wherein any *exigent* is awarded, upon pain of forty shillings for every time he offends, and is attainted by due examination of the justices of this court; such warrant to be filed upon or before the *essoign day* of every Trinity term, and within twenty-one days after the end of every other term. Hil. 14 & 15 Car. 2. C. B.

Pluries signed by clerk of warrants.

No *exigenter* shall receive any *pluries capias*, in order to make an *exigent* or proclamation thereon, before the same be signed or stamped by the clerk of the warrants.

or his deputy, to the end it may appear, that the warrant of attorney is duly filed. Hil. 2 & 3 Jac. 2.

The writ of *exigi facias*, or *exigent* as it is called, is a writ requiring the sheriff to cause the defendant to be demanded, or *exacted*, in five county courts successively, and if he should appear, to take him as on a *capias*. Nature of the exigent.

In London the courts, which are called the hustings, are held much oftener than at any other place; plaintiffs therefore who intend to proceed to outlawry, generally lay their actions in London, to expedite the return of the *exigent*, and thereby get the defendant sooner outlawed. Advantage of outlawry in London.

The writ of *exigent* must go to the sheriff of the county where the action is laid; and should bear *teste* the *quarto die post* of the *pluries capias*. Teste of exigent.

If the *exigent* goes into London, as is usual in outlawries, for expedition, carry it to one of the comptets, where clerks attend for the purpose, who require the defendant, upon five several husting-days; and if he does not appear upon the *quinto exactus*, he is returned outlawed. How if in London.

Formerly there was no other process than that of the *exigent*; for the action used to be laid where the defendant really was, and the sheriff endeavoured with due diligence to find him upon the *capias*: but as in time sheriffs became regardless of their duty, and neglected seeking after defendant upon the *capias*, and began to return the *alias* and *pluries writs* with a *non est inventus* of course; the *exigent* often issued, and men were outlawed without knowing of any process being sued out against them; especially as by degrees the *venue* in actions became transitory, and was laid not in the county where the defendant resided, so that it was not probable that upon the *exigent* he should know any thing of the exactions at the county courts. Writ of proclamation.

To prevent such secret outlawries, the statute 4 H. 8. c. 4. amended by the 6 Hen. 8. c. 4. and lastly, the 31 Eliz. c. 3. were passed, by the last of which it is enacted, "That in every personal action, wherein any
" writ

Regulated by statute 31 Eliz.

" writ of *exigent* shall be awarded out of any court, one
 " writ of proclamation shall be awarded and made out
 Teste of writ, " of the same, having *day of teste and return*, as the said
 " writ of *exigent* shall have, directed and delivered of
 where directed. " record to the sheriff of the county where the defend-
 " ant at the time of the *exigent* so awarded, shall be dwell-
 " ling; such writ of proclamation shall contain the ef-
 " fect of the same action, and that the sheriff of the
 " county, unto whom any such writ of proclamation
 " shall be directed, shall make *three proclamations* in this
 Number of pro- " form, one in open county court, one other at the general
 clamations and " quarter sessions of the peace, where the party de-
 how to be made. " fendant at the time of the *exigent* awarded shall be
 " dwelling, and one other to be made one month at the least
 " before the *quinto exactus*, at or near the most usual door of
 " the church or chapel of that town or parish where the
 " defendant shall be dwelling at the time of the *exigent*
 " awarded; and if he shall be dwelling out of a parish,
 " then in such place of the parish in the same county
 " next adjoining, and upon a Sunday after divine ser-
 " vice, and such writ to be duly returned, or the out-
 " lawry to be void."

The writ of proclamation therefore is to bear the same *teste* and return as the *exigent*; but is to be directed to the sheriff of the county where defendant lives, whether a county palatine or other franchise in England or Wales.

Effect of writ. The sheriff having made three proclamations as di-
 rected by the statute of Eliz. if defendant does not ap-
 pear before the *quinto exactus* on the *exigent*, he is pro-
 nounced outlawed by the coroner. Then the sheriffs
 How to be re- return the writs, the return to the *exigent* specifying the
 turned. five county courts when he was exacted, and the judg-
 ment of outlawry, and the return to the writ of procla-
 mation, particularizing when and where he was duly
 proclaimed.

Of the allocatur *exigent*. If it should happen that there should not be five
 county courts between the *teste* and return of the *exigent*,
 you may upon application to the *exigenter* get an *allo-*
catur exigent, allowing the number of county days
 which have already been between the *teste* and return,
 and demanding him again to appear; and if five should
 not

not be returned upon the *allocatur*, the *filazer* will make out another *allocatur*. But it is to be observed that the *exactions* must be made at five county courts *successively*, so that if any court hath intervened between the last county court and the return, at which defendant was not *exacted*, you cannot have an *allocatur*, but a new *exigent* must go, and the *exactions* be made *de novo*.

All outlawries pronounced without proclamation awarded and returned according to the statute are void.

The most scrupulous exactness is required in cases of outlawry, in the returns made by the sheriff and the like. The *King v. Almon*, 5 D. & E. 204. See also the *King v. Yondell*, 4 D. & E. 521.

When the *exigent* and proclamation are returned, the proclamation must be filed with the *exigenter*, and the *exigent* taken to the clerk of outlawries, in C. B.; but in K. B. both may be taken to the *filazer*. Writs to be filed.

The defendant being thus declared outlawed, the next step for plaintiff to take is, to obtain satisfaction against such outlaw, which may be by process either against his person, his chattels, or his land.

D. Of the Satisfaction against the Outlaw's Person, Chattels, and Lands.

D.

When outlawry is duly pronounced, and the writs of *exigent* and proclamation are returned by the sheriff and recorded above, the plaintiff is at liberty to take out further process against him; and this process is either general or special. The first is a writ of *capias utlagatum*, by which only the body can be arrested and imprisoned. The latter is a special *capias utlagatum*, by which his body may not only be imprisoned, but his goods and chattels, lands and choses in action seized, and extended. We will consider each in their order: Of the different remedies of the party.

I. Of

1. *Of Proceeding against the Person of the Outlaw.*

How *capias utlagatum* made out.

The *capias utlagatum* is made out by the *filazer*, directed to the sheriff of the county where defendant is likely to be found, who proceeds to take him accordingly.

Defendant not to be discharged without *superfedeas*.

No sheriff, under-sheriff, their deputies, or bailiffs, shall set at liberty any person arrested upon any *capias utlagatum*, until he receive a *superfedeas* according to law from the proper officer appointed. 13 Car. 2. stat. 2. c. 2. f. 4.

Formerly not admitted to bail.

Formerly, if a defendant was arrested upon the *capias utlagatum*, the sheriff could not admit him to bail, as an outlawed person was excepted out of the statutes of 23 Hen. 6. c. 9. and 13 Car. 2. stat. 2. c. 2. (unless by *superfedeas* first had and received for discharging him);

How altered by 4 & 5 W. & M.

But by the 4 & 5 W. & M. c. 18. f. 4. it is enacted, "That if any person outlawed in the *said court* * (other than for treason and felony,) shall be taken and arrested upon any *capias utlagatum* out of the *said court*, it shall and may be lawful for the sheriff who hath or shall arrest such person (in all cases where *special bail* is not required by the *said court*) to take an attorney's engagement, under his hand, to appear for the *said defendant*, and to reverse the *said outlawry*; and thereupon to discharge the *said defendant* from such arrest: and in those cases, where *special bail* is required by the *said court*, the *said sheriff* shall and may take security of the *said defendant* by *bond*, with one or more sufficient sureties, in the penalty of double the sum for which *special bail* is required, and no more, for his appearance by attorney, in the *said court*, at the return of the *said writ*; and to do and perform such things as shall be required by the *said court*; and after such

If the action be not bailable.

If it be bailable.

* "The *said court*," means the court of King's Bench; the statute being made to prevent malicious informations in the court of King's Bench, and for the more easy reversal of outlawries in the *said court*. But notwithstanding, all persons arrested upon the *capias utlagatum* out of the Common Pleas, after outlawry there, have always been bailable since the making thereof, and before might have been discharged by a *superfedeas* to the *capias utlagatum*. Vide sect. 4. in 13 Car. 2. c. 2.

"bond

"bond taken, to discharge the said defendant from the
"said arrest."

And by sect. 5. it is further enacted, "That if any
"person outlawed as aforesaid, and taken and arrested
"upon a *capias utlagatum*, shall not be able, within the
"return of the said writ, to give security as aforesaid,
"in cases where special bail is required, so as he be
"committed to gaol for default thereof, that whenso-
"ever the said prisoner shall find sufficient security to
"the sheriff, in whose custody he shall be, for his ap-
"pearance by attorney in the said court, at some return
"in the term then next following, to reverse the said
"outlawry, and to do and perform such other thing
"and things as shall be required by the said court; it
"shall and may be lawful for the said sheriff, after such
"security taken, to discharge and set at liberty the said
"prisoner for the same."

If defendant can
find bail after he
is in custody.

By the above statute, when the defendant is arrested
on a *capias utlagatum*, if the original action be not a
bailable one, he is discharged upon the attorney giving
an undertaking for his appearance; but if it be a bailable
action, he must put in special bail according to the
form above prescribed by the statute, the condition of
the bond being more special than in common bail bonds;
and the sheriff in such case must take bail, although the
capias utlagatum was not marked for bail, and no affida-
vit made of the debt.

Sheriff must
take bail though
writ not marked
for bail.

Defendant being arrested on a *capias utlagatum*, the
sheriff took an attorney's engagement, under his hand,
to appear for the defendant and reverse the outlawry,
without taking security, by bond, in double the sum for
which bail was required, pursuant to the act of 4 & 5
W. & M. c. 18. On shewing cause, why an attachment
should not issue against the sheriff for discharging the
defendant out of his custody, it was urged, that he
neither did nor could know, that it was a case requir-
ing bail, as the *capias utlagatum* was not marked for bail;
and that 12 Geo. 1. c. 29. required an affidavit; and
that the sum, for which bail is to be taken, is to be
marked on the process, &c. For the plaintiff, it was
urged, that process of outlawry is not within the stat.
12 Geo. 1. that this was by *special original*; and the
cause

If action above
10l.

cause of action was expressed in the *original process*, in which it appears he was entitled to bail. The court were clear, that this was not a case within the 12 Geo. 1. and thought the sheriff had acted improperly; but, as there was an affidavit of the under sheriff, that he had acted to the best of his understanding, without any ill intention, they enlarged the rule in order to give the sheriff an opportunity to put in bail. After which the sheriff undertook to pay the debt and costs. *Cracraft v. Gledowe*, Burr. 4 pt. 1482.

What a good return by sheriff.

Bail cannot justify to the original action.

Defendant not bailable if outlawed after judgment.

One of the defendants was arrested on a *capias utlagatum*. The sheriff admitted him to bail, and on being ruled to return the writ, returned *cepi corpus*. On which plaintiff ruled the sheriff to bring in the body. The bail came to justify. Plaintiff opposed their justification to the *original action*, insisting that the *costs* of the *original action* must be first paid, and that the bail must be put in to a new *original*, according to the statute 31 of Eliz. for both defendants, and not bail to the *original action*, which was now ended. And the court refused their justification, and on motion the court granted an attachment against the sheriff. *Philips and others v. Warburton and Randal*, B. R. Mich. 26 Geo. 3.

Defendant is not bailable if taken upon a *capias utlagatum* after judgment. The principle in all the cases is, that defendant shall not be in a better condition by standing out to outlawry, than if he had been taken on the first process.

2. Of obtaining Satisfaction from the Outlaw's Chattels.

Nature of special *capias utlagatum*.

This is done by suing out a special *capias utlagatum*, to be obtained at the *filazer's*, whereby the sheriff is directed to inquire what goods and chattels, lands and tenements, defendant had in his bailiwick at the time he was outlawed, and to extend and appraise the same, and to answer for the value or issues thereof; and also is commanded to take the body of defendant, if he can be found.

If, upon the *special capias utlagatum* any goods are taken, and the defendant is not likely to put in bail to the action,

action, or does not move to *superfede* or *reverse* the outlawry, you may get a satisfaction out of his goods; but if the same do not amount to something considerable, so as to pay all the charges of petitioning, &c. it will not be worth while to proceed.

If the plaintiff, in such case, thinks it worth his while to proceed, he must get the sheriff to extend and appraise the goods by an inquest; which the sheriff will summon if requested, the plaintiff paying the charges thereof, amounting to about two or three guineas; and if it is necessary, the plaintiff may take out a *subpoena* for witnesses to attend and give evidence upon the inquisition.

How to proceed.

The inquisition being taken, get the *capias utlagatum* returned with the inquisition annexed, which must be carried, if in B. R. to the *filazer*, who acts as clerk of the outlawries, and if in C. B. to the clerk of the outlawries, who will transcribe the inquisition, and transmit it into the court of Exchequer*. Which being done, apply to a clerk in the Remembrancer's office for a *venditioni exponas*†, by virtue of which the sheriff will sell the goods. And if the money raised thereby exceeds not 50 l. the court of Exchequer, on motion, will order it to be paid to the plaintiff; but if it exceeds that sum, the plaintiff must petition the lords of the treasury for it, who refer it to their *solicitor*, to examine into the merits of the plaintiff's demand. The petition may be in this form;

Writ must be returned.

Transcript of inquisition.

Above what amount there must be a petition.

How to petition.

" To the Right Honourable the Lords Commissioners
" of his Majesty's Treasury.

" The humble Petition of A. B.

" Sheweth,

" That C. D. late of being indebted to your
" petitioner in the sum of 100 l. your petitioner did,

Form of petition.

* The reason of sending the transcript of the record into the Exchequer is, that that court may take charge of the effects of the king, the outlaw being disabled from enjoying any thing he was possessed of, or otherwise entitled to; and the inquest having found him possessed of effects, the Exchequer, as the king's court of ordinary revenue, must take care of them, for him.

† But an eight day rule must be given on the back of the transcript, before any *venditioni exponas* can be made to sell them; and if there are not eight days in term, the rule must be for the general seal after term. These days are allowed for any one to come in and claim the goods.

“ at his very great charge, in November last, prosecute
 “ the said C. D. to an outlawry; and by virtue of a
 “ *special capias utlagatum*, directed to the sheriff of
 “ Middlesex, several goods of the said C. D. were seized,
 “ and found by inquisition to be of the value of 86*l.* 4*s.*
 “ which goods were afterwards sold by the said sheriff,
 “ by virtue of a writ of *venditioni exponas*, at the same
 “ price and value at which they were so appraised;
 “ and the money thereupon raised still remains in the
 “ hands of the sheriff of Middlesex.

“ That your petitioner's said debt, and the charge he
 “ has already been at in prosecuting the said C. D. to
 “ outlawry, greatly exceed the sum so remaining in the
 “ sheriff's hands.

“ Wherefore your petitioner humbly prays your lord-
 “ ships, that the money so levied as aforesaid, may be
 “ paid over to your petitioner.

“ And your petitioner, as in duty bound, shall ever
 “ pray, &c.

“ A. B.”

Reference thereon to the solicitor.

Whitehall, Treasury-Chambers, Feb. 1, 1780.

“ The Right Honourable the Lords Commissioners of
 “ his Majesty's Treasury are pleased to refer this petition
 “ to _____, esq. (*Solicitor to the Treasury*),
 “ who is to consider the same; and report to their lord-
 “ ships a true state of the petitioner's case, together
 “ with his opinion what is fit to be done therein.

“ A. B. (*Lord of the Treasury*).”

Proceeding
thereon.

After this reference, the plaintiff must make an af-
 fidavit, before one of the barons of the Exchequer, of
 his debt and proceedings against the defendant, and
 the charges he has been put unto; which affidavit, with
 the attorney's bill, *venditioni exponas*, and return, to-
 gether with a certificate of the proceedings on the out-
 lawry, from one of the sworn clerks of the Exchequer,
 must all be laid before the solicitor of the Treasury;
 and if he is satisfied of the truth of the premises, he
 makes his report to their lordships accordingly; and
 thereupon a warrant goes from the Treasury to the
 attorney general, to consent that so much of the money
 as remains in the sheriff's hands, after deducting the
 poundage,

poundage, be paid to the plaintiff towards satisfying the debt and costs, on his moving the court of Exchequer for an order for that purpose. On delivering the warrant to the attorney general, he gives his consent of course; then, on moving the court of Exchequer, an order is made for the sheriff to pay the money over to the plaintiff, which, on sight thereof, he will accordingly do.

The fees and expences in all amount to about 20*l*.

The order must be engrossed and put under seal, with a *subpoena* annexed to perform it (as in general all orders for payment of money, or where the party is ordered to perform any act, must be), and the sheriff or party personally served therewith; otherwise, an *attachment* for non-performance thereof will not be granted.

Subpoena.

Service thereof.

Remedy for disobedience.

3. Of obtaining Satisfaction from the Outlaw's Lands.

If the inquest upon a *special capias utlagatum*, find the outlaw seised or possessed of lands, the different parcels, in whose tenure, and of what annual value beyond reprises the same amount to, must all be set forth in the inquisition with convenient certainty. And then the prosecutor, by issuing writs of *levari facias* out of the Exchequer, for the sheriff to levy the profits, and on the return thereof, by suing out writs of *venditioni exponas* for selling those profits, and afterwards by petitioning to have the monies raised thereout paid to him in the manner before mentioned, may obtain a satisfaction for his debt, and costs of the outlawry.

How inquisition to find lands, &c.

But if the prosecutor's debt amounts to a considerable sum, and the outlaw has a *freehold interest** in the lands, and does not come in and reverse the outlawry, and there is no incumbrance prior to the inquisition on those lands, then the prosecutor may obtain a *lease* of those lands out of the Exchequer, or a *grant* thereof under the *privy seal*. To obtain a lease, it will cost the prose-

If a freehold.

How to get lease thereof.

* A *freehold interest*, because a *chattel real*, as a term for years, may be sold by a *venditioni exponas*, but a *freehold* cannot; for an outlaw in civil cases does not forfeit his freehold lands, but only the profits thereof during his outlawry.

cutor 2*5*l. or upwards; but such lease being cheaper than a grant under the *privy seal*, it has a preference to the other method of proceeding.

Petition.

If the prosecutor would have a *lease* of the lands found by the inquest, he may obtain such lease by applying to the lords of the Treasury, stating (in the nature of a petition) the amount of his debt, the proceeding to outlawry, and the substance of the inquisition on the *capias utlagatum*.

Proceeding thereon.

On presenting this petition, the secretary will make out a warrant for a *particular* to the *remembrancer* of the Exchequer; whereupon the *deputy remembrancer* will certify a *particular* of the parcels of land, and value thereof, found by the inquest.

This *particular* being signed by the *deputy remembrancer* must be carried back to the secretary of the Treasury, who will thereupon grant a warrant for a lease, which is made out at the *Pipe-office* of the court of Exchequer.

When lease obtained, how to proceed.

When the prosecutor has obtained a lease, if the tenants of the lands will not attorn tenants to the lessee, and pay their rents to him voluntarily, he may sue out writs of *levari facias* from time to time, to levy the same as they become due; and when returned, the court of Exchequer, on motion and production of the lease, will order the sums levied, whether small or great, to be paid over to the prosecutor, or lessee, without any further application to the Treasury.

What may be levied.

Under a *lease* or *levari*, the party may take the *issues** and *profits* of the lands to the value extended, but neither the king, nor his lessee, can plough the land, nor cut the wood or underwood upon it.

As to issues, the case of *Britton and Cole*, Salk. 395. Ld. Raym. 305. and Com. 51. is worthy of notice.

* What shall be accounted *issues*, vide the stat. Westm. 2. c. 39.
 " And let the sheriff know that rents, corn in the grange, and all moveables (except horse, harness, and household stuff), be contained within the name of *issues*."

On a *levari facias* to levy the yearly value of 55^l, found by the inquisition upon an *outlawry*, on a judgment in debt, the sheriff took the beasts of a stranger levant and couchant on the land. Trespass being brought, the sheriff justified under the *levari*. The court held, 1st, That by bare outlawry the party immediately forfeits his personal goods, and they are vested in the king; but he does not forfeit the profits of his lands, nor chattels real, till inquisition taken. And therefore that an alienation after outlawry, and before inquisition, is good to bar the king of the pernamcy; but if he makes a feoffment after inquisition, the feoffee has the estate, but the king shall have the profits. 2dly, That the sheriff may well take the cattle of a stranger levant and couchant, for they are the issues of the land, and the land is debtor: and if the law were otherwise, he might defeat the king of all by agisting the land; and there is better reason for their being liable in this case than for a rent charge, which is against common right, and by grant of the tenant. 3dly, That if there be a commoner or another tenant in common with the defendant, his beasts may be taken on the lands, unless the title of the commoner, or tenant in common, be found by the inquisition; and so it is, of a lease for years prior to the outlawry, for they are bound by the inquisition; and so is their title, till they avoid it by a *monstrans de droit* brought in the Exchequer. 4thly, If issues be forfeited by a juror, and returned upon him, his feoffee is liable, nay, he in reversion is liable, if the juror was only tenant for life; for this being a service for the public, the inheritance itself is made debtor, and charged to answer it: otherwise, of the issues forfeited and returned upon an outlawry. The defendant, or his heirs, feoffee or assigns, are liable, as claiming under the same estate which is charged with this debt, but it shall not charge him in reversion or remainder; for the forfeiture arises from a particular default of the tenant, and not from a charge on the inheritance.

At what time forfeiture of lands by outlawry.

Cattle of strangers on land may be taken;

or commoners, or tenants in common.

To whom it extends.

The sheriff under a *levari*, or prosecutor by virtue of a lease, must not take more than the value *extended* by the inquest; but if the value is greater than found, a writ of *melius inquirendum* may go to find the full value;

Plaintiff must not take above the value of inquest.

and such a writ may also go, if the inquisition is defective, and does not ascertain the outlaw's title, or the parcels of the lands sufficiently.

Form of Petition for a Lease of an Outlaw's Lands, at the suit of a Surviving Executor.

“ To the Right Honourable the Lords Commissioners of
“ his Majesty's Treasury.

Form of petition for a lease.

“ The humble petition of A. B. gent. surviving executor of the last will and testament of C. D. merchant, deceased,

“ Sheweth,

“ That E. F. of in the county of esquire,
“ being indebted to your petitioner's testator in his lifetime, by bond, in the penal sum of one thousand pounds of lawful money of Great Britain, conditioned for the payment of five hundred pounds, with lawful interest for the same, from the twenty-first day of May, which was in the year of our Lord one thousand seven hundred and seventy-eight; your petitioner, as executor of the last will and testament of the said C. D. deceased, did, at very great costs and charges, in the month of October, which was in the year of our Lord one thousand seven hundred and eighty, in due manner, prosecute the said E. F. to outlawry; and by virtue of a certain writ of special *capias utlagatum*, issued upon the return of the writ of *exigi facias*, against the said E. F. directed to the then sheriff of ; O. P. esquire, then sheriff of the said county of did return to the said writ of special *capias utlagatum*, to him directed, an inquisition taken at the dwelling-house of J. S. called or known by the sign of the White Lion in in the said county, on the second day of January, in the year of our Lord one thousand seven hundred and eighty-one; by which it was found, amongst other things, that the said E. F. the outlaw, on the said twenty-third day of October, in the year of our Lord one thousand seven hundred and eighty, on which day he was outlawed at the suit of your petitioner, as surviving executor of the last will and testament of the said C. D. deceased, *was seised for the term of his natu-*

“ *ral*

" val life, of and in all and singular the messuages, tene-
 " ments, and hereditaments, with the appurtenances herein-
 " after particularly mentioned and expressed, being in the
 " whole of the clear yearly value of two hundred pounds
 " of lawful money of Great Britain, beyond all reprises ;
 " that is to say, of and in a capital messuage, or mansion-
 " house with the appurtenances, called and three
 " other messuages, or dwelling-houses, with the appurte-
 " nances thereunto adjoining, commonly called or known by
 " the several names of and also of one water corn
 " grist mill, with the appurtenances, called and also
 " of and in two hundred acres of arable, meadow, and pas-
 " ture land, or thereabouts, with the appurtenances ; all
 " which said premises were situate, standing, lying, and be-
 " ing, in the parish of in the said county ; and
 " were in the tenure, possession, or occupation of ; and
 " that the said E. F. was, on the said twenty-third day of
 " October, seised of, or entitled unto, in fee simple, a free
 " fishery of and through a certain river, called in
 " the parish of in the said county ; and that the
 " same was of the clear yearly value of six pounds, beyond all
 " reprises, and was then set to for that rent, as te-
 " nant thereof to the said E. F. And that the said out-
 " law was not found in the bailiwick of the said sheriff,
 " as by the return of the said writ of special *capias utla-*
 " *gatum*, now remaining of record in his majesty's court
 " of Exchequer, amongst other things, may more fully
 " and at large appear. And your petitioner further
 " sheweth unto your lordships, that the said outlawry
 " still remains in full force and effect, not vacated, su-
 " perseded, reversed, or annulled ; and that your peti-
 " tioner's said debt and interest, together with the costs
 " and charges which he has already necessarily been
 " put unto, in prosecuting the said E. F. to outlawry,
 " amount to a large sum of money ; that is to say, to
 " the sum of and upwards. By reason whereof,
 " your petitioner hath been, and is wholly prevented
 " and hindered from administering the effects of the
 " said C. D. the testator, and fulfilling the duty and
 " trust reposed in him, as the surviving executor of
 " the said C. D. deceased. Wherefore your petitioner
 " humbly prays your lordships favour and interposition,
 " that by and with the consent of his majesty's attor-
 " ney general, in this behalf obtained, a lease may be

“ made to your petitioner, by and from his majesty’s
 “ court of Exchequer, whereby your petitioner may be
 “ enabled to levy, take, collect, and receive the issues
 “ and profits of the said outlaw’s lands, tenements, and
 “ free fishery, so found by the said inquisition, to the
 “ value thereof, respectively appraised and extended,
 “ till such time as sufficient thereout shall be made,
 “ collected, and levied, to satisfy your petitioner’s said
 “ debt, interest, costs, and charges; or until such time
 “ as the said E. F. shall cause the said outlawry, so had
 “ in due form of law against him, to be reversed or
 “ annulled. And your petitioner, as in duty bound,
 “ shall ever pray,” &c.

Of the writ of
melius inquir-
endum.

If the inquest should undervalue the land, or if all the *outlaw’s* lands or effects should not be discovered at the time of taking the inquisition, or if there should be any defect in the return, a writ of *melius inquirendum* may go from the Exchequer; on which the sheriff must summon another inquest, and enquire more particularly, and return the inquisition, which he shall thereupon take, to the barons.

General expla-
 nation of effect
 of outlawry on
 property of the
 outlaw.

From what has been said, it is to be observed, that in a *civil case* an outlaw does not forfeit any lands, of which he has an estate of *freehold*; nor any thing of which the interest was *not vested* in him, nor the things which he has in *auter droit* as executor, administrator, or trustee, nor (as it seems) any *chese in action* not a specialty. For of freehold lands he only forfeits the *profits*: so that the king or his grantee, lessee, or party who obtains a *custodiam*, can only take the rent, corn, grass, or the like, which are profits; but cannot seize or plough the land, or demise it, nor cut the wood or underwood. In fine, as above observed, by an outlawry in a civil case, *personal chattels* may be said to be vested in the king by the *outlawry*; chattels *real* as a term for years, and the trust of a term and the profits of freehold lands (which he may take by *levari facias*), not till the *inquisition* has found them. And in all these the king may be said to have a *right*, and the party who prosecuted the outlawry an *interest in that right* for recovery of his debt, which the king ought to satisfy; but which is so entirely in the breast of the crown or its officers,

officers, that such satisfaction is to be regarded rather as a matter *de gratiâ* than *de jure*. And both this interest of the party and this right of the king, are liable to be divested whenever the outlaw will come forth, reverse the outlawry, and submit himself to the laws of his country. Although *semb. contra* 5 Mod. 61. 2 H. 7. Imp. K. B. 519.

©. Of the Appearance of Defendant upon the Exigent, or after Outlawry; and the Reversal thereof by Motion, or Writ of Error.

We have hitherto considered the proceedings in outlawry on the part of the plaintiff, upon the supposition, that the defendant does not appear, nor set aside or reverse the outlawry, by motion or writ of error; but, as in civil cases, outlawry is considered merely as a civil process, the defendant may, at any time, come into Court, by putting the plaintiff in the same condition as he otherwise would have been, and so get rid of the outlawry.

He may, therefore, come in either, 1st, upon the exigent, and supersede that writ before the outlawry is completed; or, 2dly, he may appear *gratis*, or voluntarily upon the outlawry, and set it aside upon motion; or, 3dly, he may reverse the outlawry by writ of error. —We will consider each mode of proceeding in order.

©. a. Of superseding the Exigent before Outlawry.

If the defendant has notice that an *exigent* is issued out against him, and would avoid the *outlawry*, he must find out to what sheriff the writ is directed, and get a note of it, particularizing at whose suit the cause of action, and when the *exigent* is returnable; from which note, the *flazer* in B. R. or *exigenter* in C. B. will make out a *superfedeas* on the defendant's attorney entering an appearance, provided the original action be notailable, or upon defendant's putting in special bail if it isailable. Burr. 1921, *Campbell v. Dady*; which *superfedeas*

How to be done.

Of the *superfedeas*;

when granted.

sedeas must be carried to the sheriff for his allowance thereof, before the return of the *exigent* *.

Nature thereof.

The *superfedeas* is a writ taking notice of the *exigi facias* having issued, at whose suit, and for what cause; and orders the sheriff to forbear further proceedings, as the defendant duly appeared in court before the issuing thereof, and offered to answer the plaintiff; although the fact, perhaps, is the contrary.

When to be delivered.

The *superfedeas* to an *exigent* must be delivered to the sheriff before the return of the *exigent*. Barnes, 319.

Defendant must pay costs.

In superseding the *exigent*, the defendant must pay the plaintiff the costs he has been put unto by his proceedings.

How if defendant becomes a prisoner.

Proceedings on an *exigent post ca. sa.* were stayed on motion, defendant, after the *teste* and before the return, becoming a prisoner in the Fleet, and plaintiff left to charge him in execution. *Speed v. Barber*, Barnes, 321. So, *Heely v. Hewson*, Bar. 321.

How to enter Appearance, or put in Bail.

How to proceed if no bail required.

If no bail required, and common appearance is entered with filazer, and a memorandum of warrant of attorney left with him, he will give his certificate, and a judge at chambers will make an order to reverse the outlawry.

How to proceed if bail required.

If bail be required, it must be put in and perfected by two days notice exclusive being first given; or the bail may be put in at judges chambers, and the above notice given of their justifying. Filazer attends with his book, and they justify, at the time and place appointed, as in common cases; then serve rule for the allowance, and get *superfedeas* from filazer.

You may move the court immediately, at the time of justification, for outlawry to be reversed, or afterwards, upon affidavit that bail have justified. It is always on payment of costs.

* Formerly, if the defendant superseded the *exigent* before outlawry pronounced, no bail was required, although the original debt was of an amount requiring bail; but now the practice is as above stated.

c. b. Of the Defendant's coming in after Outlawry, and reserving it by Motion.

c. b.

A writ of error to reverse an outlawry in any civil case, is not often heard of now, as the party is allowed to come in and reverse by motion, and either satisfies the debt and costs, or justifies bail to appear to a new original; or, if special bail is not required, enters a common appearance; in which case the outlawry is reversed of course before a judge, or in court, by confession of some trifling error in the proceedings; as, the omission of any letter, irregularity in any of the process, want of proper addition, want of proclamation, want of filing the writ of proclamation, or, in short, any trifling matter whatever; which, in such cases, is usually confessed by the plaintiff. For, as the intent of proceeding to outlawry is answered, either by the payment of the debt and costs, or by having good bail put in to stand the event of the action, any objection to the reversal of the outlawry would be idle and nugatory.

Outlawry seldom reversed by writ of error, as it may be done by motion.

In order to reverse an outlawry, without an actual writ of error, the defendant's attorney (having entered an appearance) gets a copy of an exigent, on which is usually marked the error; which being pointed out to the secondary or prothonotary, and then shown to one of the judges, if in court, or to a judge at chambers, a certificate is made thereof, if in court, or an order, if before a judge, to the clerk of the outlawries of the said reversal. — On sight of which order or certificate, the clerk of the outlawries marks the outlawry book, discharged; and then the reversal is drawn up in paper, and entered upon the roll, and the defendant is thereupon restored in statu quo prius.

How to proceed without writ of error if nothing done on the capias utlagatum.

This is the usual way where a person is outlawed, and neither his body, goods, or lands, seized upon the *capias utlagatum*. But if his body, goods, or lands be seized, then his attorney must go to the clerk of the errors; and on putting in special bail, if requisite, he will make out a *supersedeas* to discharge the person or his effects, if taken, or if not taken, then for the sheriff to forbear. But if a man be outlawed after judgment, a reversal in the manner before mentioned will not be allowed; for an outlawry after judgment cannot be reversed till the plaintiff hath acknowledged satisfaction on record, or the defendant hath paid the money into court.

How if execution had been had on the capias utlagatum.

But

But defendant
must pay costs.

But the defendant must always pay costs on the reversal, unless the plaintiff has been intentionally irregular and oppressive, or clandestine in his proceedings.

Unless plaintiff
has been grossly
irregular.

In C. B. it was moved, that the plaintiff might reverse an outlawry at his *own charge*, upon affidavit that the defendant was actually in the Fleet, in execution for the plaintiff in another suit, and that he knew it; and it was granted, because the plaintiff should have brought him to the bar by *habeas corpus*, and there have charged him with a new declaration. *Adlame v. Colebatch*, Salk. 495.

Motion that plaintiff might reverse an outlawry at his own expence, the defendant being in parts beyond the seas at the time he was outlawed. *Per Cur.* The defendant may take advantage of this by writ of error; but it is no matter of irregularity. *Blunt v. Beale*, Barnes, 320. *Ibid.* 319.

How and when
superfedeas
must be deli-
vered to sheriff.

The plaintiff having commenced a proceeding to outlawry against defendant, he gave notice to the plaintiff that he had appeared, and obtained a *superfedeas* to the *exigent*. Plaintiff searched at the Compter (as the outlawry was in London), and no *superfedeas* being allowed there, defendant was returned outlawed, who moved to set aside the outlawry. On shewing cause, defendant alleged, that he had entered an appearance with the *exigent*; but that appeared to be unnecessary, and a novel imposition by the *exigent*. The court held, that the *superfedeas* is in itself an appearance, if delivered to the sheriff before the return of the *exigent*; but that not having been done, the defendant is regularly outlawed; and the rule to shew cause, why it should not be reversed at the plaintiff's expence, was discharged. Barnes, 319, *Peach v. Wadland*.

Defendant may
enter appear-
ance by attor-
ney.

Stat. 4 & 5
W. & M.

It was the practice in the Common Pleas, before the stat. 4 & 5 W. & M. c. 18. to allow a defendant, upon appearance by attorney, to reverse the outlawry, and not to require an appearance in person. But in the King's Bench, no one in any case, civil or criminal, could reverse an outlawry, without an appearance in person, till that statute, unless where, *ex specialia gratia* upon a reason assigned to the court, they indulged him to appear by attorney,

attorney, as in sickness, &c. Cro. Jac. 462.; but then the entry was, that he came in person, "*Quod venit in propria persona*," the law being clear, that upon an outlawry he ought to appear in person. *Vide* Carth. 7. Skin. 16. Salk. 496. But to remedy the inconvenience and expence attending an *appearance in person*, that statute enacts, "That no person who is or shall be outlawed in the said court, for any cause, matter or thing whatsoever (treason and felony only excepted), shall be compelled to come in person into, or appear in person in the said court to reverse such outlawry, but shall or may appear by attorney, and reverse the same without bail, in any cases, except where special bail shall be ordered by the said court."

Outlawry had against a bankrupt reversed on motion. Anon. 2 Crom. 50.

In what cases outlawry will be reversed or not: bankruptcy.

Rule to shew cause, why outlawry should not be reversed at plaintiff's expence. It appeared that two writs had been sued out, and defendant could not be arrested. He lived on the confines of Surry and Kent; and when the Surry bailiff came to arrest him, he jumped over an hedge into Kent, and put the bailiff to defiance. *Per Cur.* Though the defendant is sworn to appear publickly, yet it is plain he kept out of the way to prevent being arrested. Rule discharged. But, by consent, the debt and costs to be paid out of the money in the sheriff's hands; and the overplus paid to the defendant. *Holman v. Brasier*, Barnes, 320.

Abscinding of defendant;

Rule to shew cause, why outlawry should not be reversed at the plaintiff's expence. Objected, on the part of the defendant, that he was a public visible man, and that the plaintiff had not endeavoured to arrest him. That the *capias*, *alias*, and *pluries*, were all sued out at the same time. That no affidavit of the debt was indorsed on the writs (thoughailable), pursuant to the statute to prevent vexatious arrests. That no date was on the writs, as required by the statute. The affidavits, as to the defendant's visibility, were fully answered, and his total absconding proved. And the court held, that in case of a total absconding, no endeavours to arrest are necessary. That suing out the *capias*, *alias*, and *pluries* together, was regular, and warranted by constant practice.

in which case no endeavour to arrest necessary.

practice. That on process to outlawry, no affidavit for bail is required by the statute, or the course of the court, nor is a date to such process usual. Rule discharged without costs. *Farnworth v. Smith*, Barnes, 322. *Dale v. Robinson*, Bar. 322.

Defendant being beyond sea.

So where the party is beyond sea, at the time of the commencement of the outlawry, if it appears that it is with a view of absconding and defeating his creditors, court will not reverse the outlawry on motion. *Ashby v. Stockwell*, Bar. 324. *Barclay v. Green*, Bar. 325.

But if defendant is abroad *bona fide* upon business, or the like; and in other respects, is a public visible man, plaintiff cannot commence process of outlawry against him. *Reilly v. O'Conner*, Bar. 325.

How if he goes after teste of exigent.

But if defendant goes beyond sea, *after the teste of an exigent*, he may be regularly outlawed. 4 Rol. Abr. 84. Bar. 321, *Speed v. Barber*.

Where a *feme sole* has been waived, and afterwards marries, court will not set aside outlawry upon the husband entering a common appearance for himself and wife, the marriage being after the exigent. *White v. Dunster*, Bar. 321.

What affidavit necessary of defendant being visible.

On motion to reverse an outlawry, the defendant, and three others, swore that he was always visible; but the court refused, and required positive affidavit, that he might have been served with process.

If no proclamation, or return thereof be deficient.

If no proclamation was made according to statute, or if the return of the proclamation be insufficient, it may be a ground for reversing the outlawry; but more properly by writ of error than motion. *Dale v. Robinson*, Bar. 322. *Wiat v. Parker*, Bar. 323.

Of the death of plaintiff, and defendant's bankruptcy afterwards.

A writ of *allocatur* on the exigent had issued (after judgment and *ca. sa.*), returnable the first return of Michaelmas, whereupon defendant was returned outlawed 16th of July preceding. It appeared, that the plaintiff died 6th of August, and that a commission of bankrupt issued against defendant on the 21st of August, preceding the return of the exigent. Defendant

ant obtained a rule to shew cause why proceedings should not be stayed, which rule was discharged; the court being of opinion, that the writ and return must be filed, notwithstanding the plaintiff's death after the outlawry: before an actual assignment by commissioners of bankruptcy, the crown is not bound, though there is a great difference between an extent in *aid pro rege*, and an outlawry for a private person's debt. Here is no foundation to tie up the plaintiff's hands; the plaintiff (meaning the representative of the original plaintiff) may proceed if so advised. *French v. Manby*, Barnes, 323.

C. r. Of Reversing the Outlawry by Writ of Error.

C. c.

The courts, instead of driving the party to his writ of error to reverse an outlawry had against him, will mostly, as appears from the foregoing cases, relieve him on motion, where the proceedings have been *irregular*; but in doing this, the court always require, that the defendant pay the plaintiff his costs up to the *exigent*, unless where the plaintiff has proceeded *intentionally irregular*, and with a view to oppress. But where the defendant is driven to his writ of error to reverse the outlawry, either upon coming in upon the *exigent*, &c. *gratis*, or brought in upon the *capias utlagatum*, he must, in all cases, pay the plaintiff his costs to the outlawry; and, where *special bail* is required, he must put in bail, either before error can be brought to reverse the outlawry, or else upon the reversal.

In what cases
necessary.

By the 31 El. c. 3. f. 3. it is enacted, "That before any allowance of any writ of error, or reversing any outlawry be had, by plea or otherwise, through or by want of any proclamation to be had or made, according to the form of this statute, the defendant and defendants in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after allowing the writ of error, or otherwise avoiding of the said outlawry."

Of bail required,
and the condi-
tion of their re-
cognizance.

This

Stat. 31 Eliz.

This statute requires *bail* to be put in before the allowance of error, only where the error is for want of *proclamations*.

Construction thereof.

But for any other cause than for want of *proclamations*, it is sufficient if *bail* is put in before the reversal of the outlawry by the writ of error, if the original cause of action required *bail*.

Of the time of putting in bail.

As where error was brought to reverse an outlawry in Chester; to which the defendant in error pleaded, that no bail was put in before the allowance of the writ of error, according to the 31 El. c. 3. *Per Cur.* This is no plea, for it is well enough, if bail be put in at any time before the reversal. The error was the want of *pro comitatu*. *Wilbraham v. Dooley*, Ld. Raym. 605.

So where, pending error to reverse an outlawry on *mesne* process, the defendant in error moved to quash the writ, because no bail was given. *Sed per Cur.* That is never done till the outlawry is reversed; and then we take bail to appear to an original, to be brought within two terms. *Duckett v. Martin*, Stra. 951.

How far court may exercise discretion.

The defendant was outlawed in a personal action, without any affidavit of the plaintiff's demand: and having brought error, he assigned his being beyond sea at the time of the outlawry; for which the court made no difficulty to reverse it: but the question was, upon what terms they should do it, the plaintiff insisting on special bail, and having now made a proper affidavit; and the defendant insisting to file common bail only. — The court, upon considering of the 4 & 5 W. & M. c. 18. s. 3. which impowers the outlaw to appear by attorney (as he did here), and says, it shall be reversed without bail in all cases but “where special bail “shall be ordered by the court,” declared, they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before was no objection, because that is only requisite to warrant an arrest: and here was one in time for the new action that must be brought. And though the 31 El. c. 3. s. 3. is the only act that requires bail, it is not to be inferred from thence, that in other cases it ought not to be insisted on; for that act makes a new error, and the

bail upon it is absolutely to pay the condemnation-money. *Sarocold v. Hampson*, Str. 1178. 1 Will. 3. Salk. 496.

The recognizance therefore, upon the *capias utlagatum*, should be always taken by the *filazer's* clerk, according to 31 Eliz. to pay the condemnation-money. If it be taken in the usual way to *render*, it will be bad, nor can the bail render in such case. *Borwick v. Parkington*, East. T. 31 Geo. 3. *Philips v. Warburton*, Mich. T. 1785. Imp. K. B. 520.

Recognizance of bail is to pay condemnation, not to render.

Two persons were outlawed in a joint action against them, and one moved, that, on filing common bail, she might have liberty to reverse the outlawry. *Sed per Cur.* The writ of error, to reverse the outlawry, must be brought in the name of both the parties that are outlawed; and, if one only appears, the other may be summoned and severed, and then the outlawry may be reversed for the benefit of the party appearing only. *Symmons v. Bingoe and Cooke*, B. R. Salk. 496.

If two defendants are outlawed, error to be brought in name of both.

When a defendant, to reverse an outlawry, is obliged to sue out an *actual writ of error*, he must apply to the proper *curfitor* for the writ; who, on a *præcipe* given him, will make out the writ, which is to this effect:

How to obtain writ of error, and of the proceedings thereon.

"England, to wit. George the Third, by the grace of God, &c. To our justices assigned to hold pleas before ourselves, greeting. Because in the record and proceeding, and also in the pronouncing the outlawry against C. D. late of London, merchant, in a plea of *trespass on the case*, whereon he is outlawed in London, pronounced before us returned, as it is said, a manifest error hath happened, to the great damage of him the said C. as by his complaint we have understood. We, being willing the error, if any hath been, should be duly corrected, and full and speedy justice done to the said C. in this behalf, command you, that if the outlawry aforesaid is returned before us, as it is said, then, the record and proceedings aforesaid being inspected, you further cause to be done therein, for the error and vacating of the outlawry aforesaid, what of right, and according to law. VOL. II. E e

Form of writ.

"ing

"ing to the law and custom of England, shall be meet
"to be done.

"Witness ourself at Westminster, this day
"of in the thirty-sixth year of our reign."

When the writ of error is duly made out and sealed, the defendant must get it allowed by the court, on which allowance the *allocatur* is subscribed.

If the error is in the *exigent* or *return*, or *allocatur*, or in the writ of *proclamation* or *return thereto* (having first put in bail according to the statute), or in any of the proceedings, defendant gets a copy thereof, and spreads the whole record, and assigns the errors in this manner:

Form of assign-
ment of error.

"Afterwards, to wit, on next after
"in this same term, before the lord the king, at West-
"minster, comes the said C. D. by his at-
"torney, and immediately says, that in the pronouncing
"of the outlawry aforesaid, there is manifest error in
"this, to wit, that the return of the said writ of *exigi*
"facias, and also the said writ of *allocatur*, are insuf-
"ficient, invalid, and void in law; therefore in that
"there is manifest error: there is error also in this,
"that no judgment of outlawry, upon the writ of *allo-*
"*catur* aforesaid, is returned; therefore in this there
"is manifest error (and so on, assigning the error or
"errors, as they happen to be). And the said C. D.
"prays the writ of our lord the king, to warn the said
"A. B. to be before our lord the king, to hear the re-
"cord and proceedings aforesaid. And it is granted
"to him," &c.

If the plaintiff does not appear and confess the errors, the defendant must sue out a *scire facias ad audiendum errores*, &c. and upon two *nihil*s returned, the court will reverse the outlawry of course: but if the plaintiff comes in voluntarily, or upon a *scire feci*, and does not confess the errors assigned, but joins in error, the defendant must make up *error books*, and proceed to argument and judgment, as in other cases of error: for which, see *post*, ch. 20, title Error.

f. Of

f. Of declaring after the Outlawry reversed or superseded.

f.

Upon the reversal or superseding of the outlawry, if the defendant does not pay the plaintiff his debt and costs, the plaintiff must proceed to declare, the defendant having, upon reversing or superseding the outlawry, put in *special or common* bail, as the case required, to appear to a new *original*.

Of declaring after superseas or reversal.

Upon appearing and superseding the *exigent*, the plaintiff must declare within *six or eight* days after, otherwise the defendant may give him a rule to declare; and if no declaration comes in within the limited time, the defendant may nonsuit the plaintiff, and have his costs taxed. Compl. Soll. C. B. 84.

Within what time to declare after superseas or exigent.

So, if the defendant appear by *superseas*, and will not take a declaration, the plaintiff may have judgment against him, by *nil dicit*. Ibid.

But where a defendant outlawed causes the same outlawry to be reversed, the plaintiff has till the end of the second term after reversing the same, and notice thereof given, to declare in. But if he does not proceed within two terms next after notice of reversing the outlawry, the defendant shall have his costs to be taxed. Reg. Tr. 33 Car. 2. C. B.

Within what time after reversal of outlawry.

The declaration, after reversal, or superseding of the outlawry, has no need to be laid in the same county in which the former original was made. So held on demurrer. 3 Lev. 245, *Whitwick v. Hovenden*. Where the original and outlawry were in London, and on the reversal of the outlawry, the plaintiff declared in Suffex; on which it was insisted, that the original being laid in London, the plaintiff could not declare in the action in another county, though the cause of action was transitory. But the *prothonotaries* certifying, that the course of the court was, that although the *original* be laid in London, for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory; and the stat. 21 Jac. 1. c. 16. s. 4. giving the plaintiff generally

Of the venue of such declaration.

generally a power to commence a new action or suit within a year after the outlawry reversed; the plaintiff may do it in this case, to warrant his declaration delivered within the course of the court. And the plaintiff had judgment.

Of the time of commencing such new action.

By the 21 Jac. 1. c. 16. s. 4. it is enacted, "That if
" in any action brought by the original, the defendant
" be outlawed, and shall after reverse the outlawry;
" that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence
" a new action or suit from time to time, within a year
" after such judgment of outlawry reversed, and not
" after."

A new original therefore is to be sued out.

Of the bail in such new action according to 31 Eliz. c. 3.

And by the 31 Eliz. c. 3. s. 3. it is enacted, "That
" before the allowance of any writ of error, or reversing of any outlawry be had by plea or otherwise,
" through or by want of any proclamation to be had
" or made according to the form of the said statute, the
" defendant in the original shall put in bail, not only
" to appear and answer to the plaintiff in the former
" suit, in a new action to be commenced by the said plaintiff
" for the cause mentioned in the first action *, but also to
" satisfy the condemnation, if the plaintiff shall begin his
" suit before the end of two terms next after the allowing
" the writ of error, or otherwise avoiding of the said outlawry."

Construction of the statute.

Though this latter statute relates only to the reversing the outlawry through want of proclamation, and discharges the bail in such case given, if the plaintiff does not proceed within *two terms* after the reversal; yet the recognizance of bail, upon the reversal of outlawry for other causes than for want of proclamations, has mostly been taken since the making thereof according to this statute. Therefore, if the plaintiff does not declare after the reversal of the outlawry within *two terms*, the

* On this statute it is, that case will lie for the party against the sheriff, for an escape upon an outlawry on *mesne process*: for though the party is in custody merely at the suit of the king, and the plaintiff has no interest in his body, yet he cannot have his outlawry reversed without security first given to appear to a new original. Fitzg. 265. Cro. El. 652. S. P.

bail are discharged. But though they are discharged from their recognizance, the plaintiff is not barred of his action, provided he commences the same within a year after the reversal of the outlawry, according to the 21 Jac. 1. c. 16. *supra*.

Bail upon the reversal of outlawry, cannot render their principal in discharge of themselves; for they are absolutely bound to pay the condemnation-money.

Bail cannot render.

Defendant was outlawed on a special original, and upon reversing the outlawry, put in bail, with condition as usual, to appear to a new original, to be filed within two terms. Plaintiff proceeded to judgment, and defendant brought a writ of error; a motion was made on behalf of the bail, to discharge their recognizance, no original having been filed within the two terms; and a rule made to shew cause, which was discharged. The bail may plead as they shall be advised. *Carleton v. Wilkinson*, Barnes, 86.

How if no original filed within two terms.

Upon superseding the exigent, if plaintiff delivers a declaration, there should be a notice to plead; and a rule given to plead; before judgment for want of a plea can be signed. And defendant has, in such case, the same time to plead as in other cases. Barnes, 271, 272.

Of the notice to plead, and subsequent proceedings.

Of Restoration after Outlawry reversed or determined.

¶

Every outlawry determines upon the death of the party outlawed; and if the party was outlawed on a civil suit, the representatives of the outlaw, shall have a restoration of the lands seized, or effects, if they remain in the sheriff's hands not disposed of; whereas in criminal cases outlawry works an entire forfeiture of the outlaw's estate, both *real and personal*.

Outlawry determined by the death of the defendant.

In order to reverse an outlawry on death, there must be a certificate from the minister of the parish, where the party died or was buried; and likewise an *affidavit* of his death, by some person that was acquainted with him, and was present at the death or burial, in which *affidavit* the party should be described as in the outlawry.

Of the affidavit in such case.

How such death
to be pleaded.

But though *outlawry* determines upon the death of the outlaw, yet before the king's hands can be removed from the lands or goods seized, such death must be pleaded, and judgment entered up thereon in the Exchequer, upon the plea being confessed by the attorney general. And in like manner, if the outlawry is reversed (which must be done in the original court where the action was brought) for any other reason, a *certificate* of such reversal from *the clerk of the outlawries* must be pleaded and confessed, and judgment entered up thereon in the Exchequer before the king's hands can be removed.

How to proceed
in other cases of
reversal of out-
lawry.

Form of sug-
gestion.

These proceedings are in the nature of a *suggestion upon the roll* in the court of Exchequer.—The judgment by the barons in such case is, "That his majesty's hands be removed from the possession of the premises in the inquisition mentioned; and that the said A. B. (the representative or outlaw, as the case is) be restored to his possession thereof, together with the rents, issues, and profits thereof, which have not as yet been answered to his said majesty; and that the said lease, in form aforesaid made, be void and of no effect"; and that, as well the said R. S. late sheriff of the county of _____ as all others who have been, now are, or hereafter shall be sheriffs of the said county, shall be discharged in their accounts towards his said majesty, his heirs and successors, as well of the rents and profits of the said premises, as of the said annual rent of _____ which have not been answered his said majesty; and lastly, that the said A. B. as to the said premises, may be dismissed the court, by reason of the said confession, and other the premises."

Subsequent pro-
ceedings.

The plea may be put in by any person: for though the judgment is, that he shall be restored to the possession of the premises, yet it gives no title to the lands.

In order to discharge the sheriff, the judgment-roll must be carried to the *pipe-office*, that a *quietus* may be made thereupon.

Of the writ of
amoveas manus.

If after such judgment any difficulty attends the getting possession, a writ of *amoveas manus* must be sued.

* In case a lease has been granted by the Exchequer.

out of the Exchequer, directed to the sheriff, who will thereupon deliver possession.

A merchant having 500 *l.* stock in the India company, was outlawed before judgment at the suit of W. R. The king, after inquisition and seizure, upon petition, granted the 500 *l.* stock to the said W. R. and that he might sue for it in his name. W. R. thereupon got the stock transferred to him, and then the merchant reversed the outlawry, and obtained restitution *de omnibus quibus nobis non est responsum*. And on question, whether he should have the stock back? the court held that W. R. should not restore it, because the grant was executed and vested in W. R.; and as to that matter the king was answered. *Vide 2. Lev. 49.*

§. Of Outlawry after Judgment.

If the original proceedings were by special original, plaintiff may proceed to outlaw defendant after judgment obtained, if he cannot be taken on the *ca. sa.*; which must first be sued out in the usual way, into the same county where the action was laid, *Et non est inventus* returned thereto by the sheriff, upon which the *filazer* will make out the *exigent*; and upon that being delivered to the under-sheriff, and returned as other *exigents*, the *filazer* will then make out a general or special *capias utlagatum* into as many several counties as you will, either in England or Wales. The *exigent* may be had immediately upon the return of the *ca. sa.* without any *alias* or *pluries*, and also without a writ of proclamation. *Cro. Jac. 677.*

Proceedings in such case.

The advantages of this proceeding to outlawry after judgment are: that if the defendant moves from county to county, to avoid being taken, you may take out, at once, as many writs of *capias utlagatum* against him as you please; and this at a moderate expence; whereas, in common cases, you cannot regularly have execution against him in above one county at a time.

Advantage of such proceeding to outlawry.

It also saves the charge of reviving a judgment by *scire facias* after the year and day have expired.

If the defendant be taken on the *capias utlagatum*, he cannot be discharged without reversing the same for error, or making plaintiff satisfaction.

Of receiving judgment of outlawry on defendant's death.

Defendant was outlawed after judgment, and taken by a *capias utlagatum*: on motion to set aside the *capias utlagatum*, because the judgment of outlawry appeared to be entered after plaintiff's death, and that the *capias utlagatum* had issued without a revival of the judgment by *scire facias*, by plaintiff's executors, rule was made absolute. *The King v. Manby*, Bar. 325.

SECTION V.

Of Prohibition.

Nature of the remedy.

The writ of prohibition is a remedy provided by the common law against the encroachment of jurisdiction, or the calling of a person to answer in a court that has no legal cognizance of the cause. 3 Blac. Com. 111. It is a writ directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court. Not only the inferior courts of common law, as the courts of the counties palatine, or principality of Wales, if they hold plea of land, or other matters not lying within their respective franchises; and the county courts, or courts baron, if they hold plea of any matter of the value of 40*l.*; but also all other inferior courts; as, the ecclesiastical courts, the university courts, the court of chivalry, the court of admiralty, the court of prize, and courts martial, whether naval or military, are liable to the controuling authority which the courts of Westminster-hall have, from time to time, exercised for the purpose of preventing their exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction when the court assumes a power to act in matters not within its cognizance. *Grant v. Sir Charles Gould*, 2 H. Blac. 100. As if the court ecclesiastical

To what courts it extends.

In what cases granted.

ecclesiastical should attempt to try the validity of a custom pleaded; or a suit for breaking open a chest in a church, and taking away title deeds to the advowson, 3 D. and E. 351.; or the admiralty court should presume to try a contract made, or to be executed, within this kingdom.

Also, if in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases, a prohibition will be awarded; for, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought, therefore, where the two laws differ, to be decided, not according to the spiritual, but the temporal law, else the same question might be determined different ways, according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a good ground of prohibition. And, if either the judge, or the party, shall proceed after such prohibition, an attachment may be had against them, to punish them for the contempt, at the discretion of the court that awarded it; and an action will lie against them, to repair the party injured, in damages. 3 Blac. Comm. 112.

Other grounds for granting it,

Another ground or species of prohibition is, where an act has passed with respect to any authority resident in other courts, as in the *ecclesiastical* court, in which there is an inherent jurisdiction. In such a case, the courts of Westminster-hall have conceived, that where the authority is limited by an act of parliament, the court which acted differently from the prescription of the act was, in that instance, exceeding its jurisdiction, and, therefore, liable to a prohibition. *Grant v. Sir Charles Gould*, 2 H. Blac, 100. For the late decisions respecting the prohibitions to the *ecclesiastical* courts, see *Darby v. Cozens*, 1 D. & E. 552. *Bishop of Chichester v. Hayward*, 1 D. & E. 650. *Carlshall v. Mapledoram*, 2 D. & E. 473. *Gardner v. Parker*, 3 D. & E. 551. To the admiralty court, *Mentone v. Gibbons*, 3 D. & E. 267.

Different cases on the subject.

E. 267. *Smart v. Wolf*, 3 D. & E. 323. *Veltbasen v. Ormsley*, 3 D. & E. 315. To the prize court, *Lord Camden v. Home*, 3 D. & E. 382. 1 H. Blac. 476. *Bayner v. Atkins*, 1 H. Blac. 164. To the court martial, *Grant v. Sir Charles Gould*, 2 H. Blac. 100.

History of the proceedings.

The proceedings in prohibition are briefly as follows:—The party aggrieved applies to the superior court, setting forth, in a suggestion upon record, the nature and cause of his complaint, in being drawn *ad aliud examen* by a jurisdiction, or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appears to the court to be sufficient, the writ of *prohibition* immediately issues, commanding the judge not to hold and the party not to prosecute the plea; but sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare in prohibition*; that is to prosecute an action, by filing a declaration against the other, upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if upon demurrer and argument the court shall finally be of opinion, that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant, and also the inferior court, shall be prohibited from proceeding any further. On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him when he applies for the prohibition in the court above, and a *writ of consultation* shall be awarded, so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court. And, even in the ordinary cases, the writ of prohibition is not absolutely *final* and conclusive. For, though the ground be a proper one in point of law, for granting the prohibition; yet, if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a custom be pleaded in the spiritual court, a prohibition

ought to go, because that court has no authority to try it: but, if the fact of such a custom be brought to a competent trial, and be there found false, a writ of consultation will be granted. For this purpose the party prohibited may *appear* to the prohibition, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it, denying the contempt and traversing the custom upon which the prohibition was grounded: and, if that issue be found for the defendant, he shall then have a writ of consultation. The writ of consultation may also be, and is frequently granted by the court without any action brought; when after a prohibition issued upon more mature consideration, the court are of opinion that the matter suggested is not a good and sufficient ground to stop the proceedings below. Thus careful has the law been, in compelling the inferior courts to do ample and speedy justice; in preventing them from transgressing their due bounds; and in allowing them the undisturbed cognizance of such causes as by right, founded on the usage of the kingdom or act of parliament, do properly belong to their jurisdiction. 3 Blac. Comm. 113.

We now proceed to consider:—

A. From what Courts, and in what Stage of a Suit the Writ of Prohibition may issue.

B. Of the Suggestion.

C. Of proving the Suggestion, and entering such Proof according to Stat. 2 & 3 Edw. 6.

D. Of verifying the Suggestion by Affidavit.

E. Of granting the Prohibition.

F. Of declaring in Prohibition.

G. Of the Writ of Consultation.

H. Of granting Prohibition after Consultation awarded.

I. Of Disobedience to Writ of Prohibition.

A. From

3.

2. From what Courts Prohibition may issue, and at what Stage of the Suit.

Jurisdiction in cases of prohibition of K. B.

The superior courts at Westminster, having a superintendency over all inferior courts, may, in all cases of innovation, &c. award a prohibition: in this the power of the King's Bench has never been doubted. F. N. B. 53. 4 Inst. 71.

Of Chancery.

Also the court of Chancery may award a prohibition, which may issue as well in vacation as in term time; but such writ is returnable into B. R. or C. B. Bro. Proh. pl. 6. 4 Inst. 81. Will. Rep. 43.

Whence writ may issue in vacation.

As the common law courts are not always open, if one is sued in an inferior court for a matter out of the jurisdiction, the defendant, if it happen in *vacation time*, when only the Chancery is open, may move that court for a prohibition: but then it must appear by *oath* made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused; and if a prohibition has been granted out of Chancery *improvidē*, or without these circumstances attending it, the court will grant a *superfedeas* thereto, Will. Rep. 426. pl. 135.

Of Common Pleas.

As the jurisdiction of the court of Common Pleas is founded on *original writs* out of Chancery, it was formerly doubted whether it could, without count or plea depending therein, award a prohibition: but it has been determined by the unanimous sense of all the judges, that this court may, upon a suggestion, grant prohibitions, to keep as well *temporal* as *ecclesiastical* courts within their bounds and jurisdictions; and that without any *original writ* or *plea* depending: the common law being in these cases a prohibition of itself, and standing instead of an *original*. Bro. Proh. pl. 6. Noy, 153. 12 Co. 58. 108. 4 Inst. 99. 2 Brownl. 17. Vaughan, 157.

Of grand sessions in Wales.

The grand sessions in Wales may also send a prohibition, and write to the spiritual courts there, as well as the courts here may. Sid. 92. *Sed vide* Cro. Car. 341. Jones, 330. Vaugh. 411.

In

In B. R. and C. B. this difference hath been made; that in B. R. a prohibition may be awarded upon a bare surmise without any suggestion on record; but that for a prohibition out of C. B. there must be a suggestion on record; and therefore the latter is considered as the suit of the party, and in which he may be nonsuited, and is not discontinued by the demise of the king; but the former is only in nature of a commission prohibitory, which is discontinued by the demise of the king. Noy, 77. Palm. 442. Latch. 114. But if an attachment issues upon such prohibition, or the party puts in bail, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuit, but not before. Palm. 423. Latch. 114.

Difference in this respect between B. R. and C. B.

Of the suggestion in C. B.;

But *per Holt*, ch. just. B. R. a prohibition cannot be moved for, if it be insisted, till the suggestion be entered on record. Salk. 136. and in B. R.

So, for want of a suggestion on record, the court of B. R. discharged the rule to shew cause why a prohibition should not be awarded. *Hawkins*, assignee of *Wooldridge*, a bankrupt, against *Blaquire* and others, assignees of *Sampson*, Hil. 20 Geo. 3.

It hath been said, that the granting a prohibition is *ex debito justitiæ*; but the better opinion seems to be, that the awarding a prohibition is a matter *discretionary*, i. e. that from the circumstances of the case, the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted, Salk. 33. pl. 6. Ld. Raym. 220. 578. 586.

Granting prohibition is discretionary.

It hath been determined in the house of lords, that no writ of error will lie upon the refusal of a prohibition; but when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie, because there is a judgment. Ld. Raym. 545. Salk. 136.

Of the writ of error thereon.

No prohibition can be had, unless the party is in danger by some suit actually depending; and therefore a pro-

There must be suit depending to warrant prohibition:

a prohibition cannot be granted before a libel, or appearance to a suit below, Salk. 35. pl. 8. March. 24. 25.; for a prohibition *quia timet* does not lie. Allen, 56.

and court must proceed to try extra-judicially;

So, where the subject of a suit in an inferior court is within the jurisdiction of that court, though in the proceedings a matter be stated which is out of the jurisdiction, yet unless the court is going on to try such matter, a prohibition will not lie. *Dutens clerk v. Dobson*, 1 H. Blac. 100.

or against the rules of law.

Or where matters triable at common law arise incidentally in a cause, and the ecclesiastical court has jurisdiction in the principal point, the court will not grant a prohibition to stay trial unless they proceed to try contrary to the course of the common law. *Full v. Hutchins*, Cow. 424.

When prohibition may be granted before, and when after sentence.

It is clearly agreed, that in all cases where it appears upon the face of the libel, that the admiralty or spiritual court, &c. have not a jurisdiction, a prohibition may be awarded, and is grantable *as well after as before sentence*; for the superior courts are to take care that the inferior courts keep within their due bounds. 2 Inst. 602. 2 Roll. Abr. 318. Noy, 137. Sid. 65. Cro. Eliz. 571. Moor, 462. 907. Carth. 463. Skin. 299. pl. 2. But *after sentence* a prohibition shall not go, unless the want of jurisdiction in the court below appears upon the face of the proceedings. Burr. Rep. 2036. 2040. *Leman v. Gouty*, 3 D. & E. *Blaquire v. Harvins*, Doug. 378.

In case of a modus;

Where a modus is pleaded in an ecclesiastical court, a prohibition may be granted any time before final sentence. *Darby v. Cozens*, 1 D. & E. 552.

or if the court hath only cognizance only in part,

If the spiritual court hath cognizance of part of the charge only and not the rest, the court after sentence below will not grant a prohibition. *Carstake v. Mapledoram*, 2 D. & E. 473.

Not granted after sentence, if only defect of trial.

And although a prohibition lies *after sentence*, where it appears on the face of the proceedings that the ecclesiastical court hath no cognizance of the cause; yet it is otherwise, if there be only a defect of trial. As where the

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the plaintiff has grounded his libel on a custom, he shall not, after it is found against him, obtain a prohibition. *Full v. Hutchins*, Cow. 422.

So that in such case the party must apply before sentence; for if he submits to trial he is afterwards too late. *Ibid.*

A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subject matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. *Darby v. Cozens*, 1 D. & E. 552.

When granted to a court of appeal.

B. Of the Suggestion for a Prohibition.

25.

Where the court has a natural jurisdiction of the thing, but is restrained by some statute, as by 23 Hen. 8. for not citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. *Vide* the authorities *antea*, and Cro. Car. 97. 2 Show. 145. pl. 153. 155, &c. 2 Salk. 543. pl. 1. Ld. Raym. 27. Salk. 30. Carth. 33.

When party must apply.

When a prohibition is moved for, the method is for the party to file a *suggestion* in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays the prohibition; and upon this the court grants a rule to shew cause why a prohibition should not issue; and if upon shewing cause it appears to the court that the *supra*mise is not true, or not clearly sufficient to ground the prohibition upon, they will deny it; otherwise they will make the rule absolute for a prohibition; or if the matter be doubtful, they will order the party to declare. *Hob. 67.*

Suggestion, what.

Proceedings thereon.

The court will not grant a prohibition the last day of term, but on motion a rule may be obtained to stay proceedings till the ensuing term. *Latch. 7.* 2 Rol. Rep. 456.

The

The form of a suggestion for a prohibition to the bailiff of a borough, to prohibit him from holding plea in a matter arising *extra jurisdictionem*.

The suggestion for a prohibition is to the following effect :

Form of suggestion for prohibition to bailiff of a borough to prohibit him from holding plea in a matter not within his jurisdiction.

“ Great Britain. Be it remembered, that on
 “ next after fifteen days of Saint Martin, in this same
 “ term, before the lord the king at Westminster, comes
 “ A. B. in his proper person, and giveth the court of
 “ our lord the king here to understand, that *whereas*
 “ by a certain act of parliament, made at a parliament
 “ holden at Westminster the twenty-fifth day of April,
 “ in the third year of the reign of the late king Edward
 “ the First, it was (amongst other things) ordained and
 “ established by the authority of the same parliament,
 “ ‘Of great men and their bailiffs, and other (the king’s
 “ officers only excepted, unto whom especial authority
 “ is given) which at the complaint of some, or by their
 “ own authority, attack others passing through their
 “ jurisdiction with their goods, compelling them to
 “ answer afore them upon contracts, covenants and
 “ trespasses, done out of their power and their jurisdic-
 “ tions, where indeed they hold nothing of them, nor
 “ within the franchise, where their power is, in preju-
 “ dice of the king and his crown, and to the damage
 “ of the people ; it is provided, That none from thence-
 “ forth so do ; and if any do, he shall pay to him, that
 “ by this occasion shall be attached, his damage double,
 “ and shall be grievously amerced to the king,’ as by
 “ the statute (amongst other things) it more fully ap-
 “ pears : nevertheless, one C. D. not ignorant of the
 “ premises, but contriving and intending the said A.
 “ against the form of the statute, unjustly to vex, op-
 “ press, and weary, and to draw him into plea in the
 “ court of our lord the king, of record, of the borough
 “ of Bridgenorth, in the county of Salop, held in the
 “ said borough, before the bailiff of the said bo-
 “ rough, in a certain action which had arisen and ac-
 “ crued out of the jurisdiction of that court ; and also
 “ the common law of the realm (to every subject of
 “ right due) to derogate from and abridge, and the due
 “ course of law to subvert, and the issues and profits
 “ which to the said lord the present king thereof might
 “ happen, and which to his royal crown especially be-
 “ longeth

" longeth to diminish, in the said court of our said lord
 " the present king, of record there, held on
 " in the thirty-fifth year of the reign of the lord the
 " present king, before the bailiffs of the said borough,
 " according to the custom of the said borough, from
 " time whereof the memory of man is not to the
 " contrary, used and approved, levied his certain plaint
 " against the said A. in a certain plea of trespass upon
 " the case, to the damage of the said C. D. of fifty
 " pounds, and the said C. D. by pretence of the plaint
 " aforesaid, in form aforesaid levied and affirmed, then
 " and there caused and procured him the said A.
 " passing within the jurisdiction of that court, to be at-
 " tached and arrested, and compelled the said A. to
 " appear in the said court, and the said A. of and upon
 " the premises unjustly constrained to answer. And
 " thereupon in the same court, held on the day
 " of in the thirty-fifth year of the reign afore-
 " said, before the said bailiffs of the said borough, the
 " said C. D. upon his aforesaid plaint did declare
 " against the said A. in manner and form following ;
 " that is to say, C. D. complains against A. B. (here
 " insert the declaration) &c. which said plaint now re-
 " mains in the said court depending and undetermined,
 " and there in the said court is prosecuted by the said
 " C.—" *Whereas*, in truth and in fact, the aforesaid
 " cause of action in the said plaint and declaration
 " mentioned, arose and accrued to the said C. D. out
 " of the said borough of Bridgenorth, and out of the
 " jurisdiction of that court; that is to say, at the
 " parish of in the said county of Salop, and
 " not within the said borough of Bridgenorth, or with-
 " in the jurisdiction of that court. And whereas the
 " said A. holds nothing of them the said bailiffs, or
 " within the franchise or jurisdiction of that court.
 " And whereas in fact the bailiffs of the said borough,
 " or any of them, never had, or hath power to hold the
 " plea aforesaid, nor to hear and determine the said plea
 " as aforesaid, arising and accruing out of the jurisdic-
 " tion of the said court, by the laws of this realm, nor by
 " virtue of any letters-patent of the said lord the present
 " king, nor any of his progenitors or predecessors, kings
 " or queens of this realm, nor by any title of prescrip-
 " tion, from time whereof the memory of man is not to
 " the contrary used and approved, or any otherwise
 " how.

" howsoever ; " *And although the said A. all and singular*
 " *the matters and things by him above suggested, hath*
 " *pleaded in his discharge in the aforesaid court* * before
 " the aforesaid bailiff of the said borough, and there
 " offered to verify and prove the same by undeniable
 " testimony and proof ; *nevertheless*, the bailiffs of the
 " borough aforesaid, the aforesaid plea and allegation of
 " the said A. there to receive or admit altogether refused,
 " and threatened to give judgment in the said court, in
 " the said action, against the said A. in contempt of
 " our lord the present king, and to the great damage
 " of the said A. and contrary to the law of this realm,
 " and also against the form of the statute aforesaid ;
 " and this the said A. is ready to verify : *whereupon* the
 " said A. humbly imploring the aid and munificence
 " of the court of our lord the present king, prays
 " speedy remedy, and a writ of our lord the present
 " king of prohibition to be directed to the said bailiffs
 " of the said borough, and other competent judges in
 " that behalf ; and also to the said C. his counsellors,
 " attornies, and solicitors, in this behalf whomsoever,
 " to prohibit them and every of them, that they, or any
 " of them, in the said plea of trespass, in any manner
 " touching the same in the said court, before the said
 " bailiffs of the said borough, or any of them, to pro-
 " ceed should not presume, nor any further in that be-
 " half should attempt, which to the further derogation
 " of the crown of his present majesty, or to the con-
 " tempt of the law, or the loss or prejudice of the
 " said A. might in any wise turn, on pain of incurring
 " the punishment due to violators of the law of this
 " realm ; but from all further prosecution against the
 " said A. in the said court, before the bailiffs of the
 " said borough, or any of them, should utterly desist,
 " and each and every of them should desist ; and it is
 " granted to him," &c.

The form of a suggestion for a prohibition to an ecclesiastical court on a libel there by a vicar against a

* Note, Where there is no *defectus jurisdictionis*, but only *tristitia*, the defendant must plead it below, and have his plea disallowed, before he can be entitled to a prohibition. But where there is a *defectus jurisdictionis*, the party has no occasion to plead it below before motion for prohibition. Therefore in the above precedent given of a suggestion there was no occasion for that part of it.

parishioner for subtraction of tithes, setting forth that there is a *modus* in the said parish, &c.

"England. Be it remembered, that on
 "next after days from the day of Easter, in
 "this same term, before our lord the king, at West-
 "minster, comes A. B. by his attorney, and
 "gives the court here to understand and be informed,
 "that *whereas* all and all manner of pleas, of and con-
 "cerning any prescriptions and customs whatsoever
 "within this realm, and the cognizance of such pleas,
 "belong and appertain to the said lord the king, and his
 "royal crown, and to the common law, and in the
 "courts of our said lord the king, of record, ought and
 "have always been accustomed to be tried and dis-
 "cussed, and not in any ecclesiastical court. And
 "*whereas* on the 1st day of January 1795, the said
 "A. B. was, and from thence hitherto hath been, and
 "still is, seised in his demesne as of fee, of and in
 "divers, to wit, thirty, acres of meadow, situate, lying
 "and being within the parish of in the county
 "of and within the bounds, limits, and tithe-
 "able places thereof; and during the time aforesaid,
 "was possessed of divers cows and calves, within the
 "said parish, and the bounds, limits, and titheable
 "places thereof. *And whereas* within the said parish
 "there are, and from time whereof the memory of
 "man is not to the contrary, have been, certain cus-
 "toms and modes of tithing, that is to say, one certain
 "custom, &c. [*inserting the customs and moduses, &c.*];
 "*nevertheless*, one C. D. clerk, vicar of the parish of
 "aforesaid, not ignorant of the premises, but
 "contriving unduly to aggrieve and oppress the said
 "A. B. against the due course of the law of this realm,
 "and to draw the cognizance of a plea which belongs
 "to our lord the king's temporal courts, and ought
 "there to be tried, discussed, and determined, to an-
 "other trial, on the day of 1795, drew
 "the said A. B. into a plea, and caused him to appear
 "in the court Christian, before the right worshipful
 "J. C. master of arts, vicar general, and principal of
 "the episcopal or consistorial court of law-
 "fully constituted, his surrogate, or some other com-
 "petent judge in that behalf, by craftily and subtilly
 "libelling against the said A. in the said court Christian

Form of sug-
 gestion for pro-
 hibition to an
 ecclesiastical
 court, in a mat-
 ter of tithes,
 where there is a
 modus set up.

“—First, that in the year, &c. [*state the libel*]; and
 “although the said A. hath alleged and pleaded all and
 “singular the matters above suggested and alleged in
 “the said court Christian, in his discharge of and from
 “the tithes, &c. and offered to prove the same by
 “indisputable evidence; yet the aforesaid spiritual
 “judges have altogether refused, and still do refuse, to
 “admit or receive the same plea, allegation, or proof,
 “and endeavour with all their might to compel the
 “said A. to pay the said monies in the aforesaid libel
 “specified, and daily threaten to condemn the said A.
 “of and upon the premises, in contempt of our said lord
 “the king and his laws, to the great damage and injury
 “of the said A. and against the course of the law of
 “this realm, and the customs and prescriptions afore-
 “said; all which said premises the said A. is ready to
 “verify and prove, as the court of our lord the king
 “here shall direct; *wherefore* the said A. imploring the
 “aid and assistance of this court here, prays relief, and
 “his majesty’s writ of prohibition to be directed to the
 “said official principal of the episcopal consistorial court
 “of aforesaid, his surrogate, or other com-
 “petent judge in this behalf, to prohibit them and every
 “of them, that neither they nor any of them do any
 “further hold pleas in the said spiritual court, before
 “them or any of them, touching the premises afore-
 “said, or any part thereof,” &c.

For other forms, respecting other matters, see the books of entries.

In what cases courts will grant prohibition in matters of tithes.

From various books and reports, the force, effect, and validity of agreements for *tithes*, whether such agreements are by indenture or *parol*, appears to be a very unsettled point. And it is said to be the constant practice of the courts at Westminster, not to grant *prohibitions* upon the suggestions of such agreements, but to leave it to the spiritual court to determine: and if the party thinks himself there aggrieved, he may appeal. And this seems to hold still, as to such *parol* leases under the term of three years; for if they be above three years, then by the *stat. of frauds and perjuries*, they are made to have the force only of leases at will; and if under three years, yet by that statute there must be yearly reserved two-thirds, at least, of the full im-
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proved value of the thing demised. Comp. Incumb. 339, 340. *Vide* Bac. Abr. 3 vol. 336, &c.

C. Of proving the Suggestion, and entering such Proof according to 2 & 3 Edw. 6.

C.

If the suggestion for a prohibition is to stop a suit commenced in the ecclesiastical court for subtraction of *tithes or other ecclesiastical dues*, the 14 sect. of the 2 & 3 Edw. 6. c. 13. requires, "That if any party do sue for any prohibition in any of the king's courts, that then the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demandeth the prohibition, the very true copy of the libel depending in the ecclesiastical court, concerning the matter whereupon the party demandeth the prohibition, subscribed or marked with the hand of the same party; and under the copy of the said libel shall be written the suggestion, wherefore the party so demandeth the said prohibition: and in case the said suggestion, *by two honest and sufficient witnesses at the least*, be not proved true in the court where the prohibition shall be so granted, *within six months* next following after the said prohibition shall be so granted and awarded, that then the party that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall, upon his or their request and suit, without delay, have a consultation granted in the same case in the court where the said prohibition was granted; and shall also recover *double costs and damages* against the party that so pursued the said prohibition," &c.

Statute 2 & 3 Edw. 6. requiring suggestion to be proved in cases of subtraction of tithes, &c.

As this statute refers to the statutes 27 & 32 Hen. 8. which extends to tithes and offerings generally, all such tithes and church duties as are mentioned in those statutes are as much within this act as if enumerated. 2 Inst. 662. Comp. Incumb. 600. Dyer, 170. b.

Construction of statute.

And therefore it extends to prohibitions to suits for small tithes as well as great. Yelv. 102. Ld. Raym. 1172.

To what it extends.

F f 3

So,

PROHIBITION. [Ch. XVIII.]

So, a suggestion of a *modus decimandi* ought to be proved within *six months*, being within this act. Noy, 148. Yelv. 104.

So, where the party suggested, that he was to pay so much upon an *arbitrament*, being the same as a *modus decimandi*. Roll. Rep. 55.

But there needs no proof of the suggestion where the suit is for tithes contrary to common right, or where the contract of the party is suggested. Yelv. 104. 119. 2 Leon. 29. Hetl. 145. 2 Keb. 134. Lit. Rep. 297.

How suggestion must be proved.

The suggestion need not be proved strictly; proof by hearsay is sufficient. Palm. 397. Or that it is so by common fame. Noy, 28. Nor with precise certainty as to all its circumstances; but that if it be proved in substance, or in such a manner as to shew that the ecclesiastical court hath not jurisdiction, it is sufficient.

By what witnesses.

And the suggestion may be proved by persons, although such persons at the trial may not be able and competent witnesses. *Sharp v. Hobarts*, Mich. 27 Car. 2. C. B.

If a suggestion consists of two parts, one witness to one part, and another to the other part, it is sufficient. Vent. 107.

Within what time.

If the party is ordered to declare in *prohibition*, the proof of the suggestion need not be within *six months*, because the proof in such case is to be made at the trial of the cause. Cas. in C. B. 158.

The *six months* in this case is according to the *calendar*, and not *lunar months*, for this is a computation which concerns the church. Hob. 179. 2 Mod. 58. Lit. Rep. 19. And the *six months* commence from the *teste* of the writ of *prohibition*, not from the time of the rule for awarding it. 2 Ld. Raym. 1172. 2 Salk. 554. pl. 20. 656. pl. 2.

And if the surmise be proved before one of the judges within the *six months*, it is sufficient, although it is not recorded

recorded till after the six months by the court. Noy, 30.
But it must be entered in the office. 2 Show. 308.

And proof which is not sufficient, may be supplied with better within the six months. Lit. Rep. 155. Proof may be amended.

The plaintiff had obtained a rule to shew cause why a *consultation* should not go, for want of the plaintiff's proving his suggestion with the *six months*, and why the plaintiff should not pay double costs. Upon cause shewn it appeared, that the declaration had been, by rule, ordered to be made agreeable to the proceedings in the spiritual court, and thereupon a prohibition to issue. And the court being of opinion, that the time for proving the suggestion ought to be computed from the time of the amendment, and not farther back, the six months were not expired. So the rule was discharged. Barnes, 428. How the six months in stat. are computed.

A writ of *prohibition* had been granted on motion, and plaintiffs not having proved their suggestion according to the statute 2 & 3 Edw. 6. to be true within *six months*—It was moved, that a writ of *consultation* might be awarded for defendant, plaintiffs not proving their suggestion to be true within the limited time; and that plaintiffs might, according to the direction of the statute, pay defendant *double costs*. It was doubted, whether plaintiffs, being administrators, ought to pay costs. But the court seemed to think, that defendant was intitled of course to a writ of *consultation*. *Sed Cur advis'* as to both points. Barnes, 130. Of the costs on failure of proof of suggestion.

When the party has proved his suggestion before a judge, according to the 14th sect. of the 2 & 3 of Edw. 6. c. 13. an entry of such proof must be drawn out in order to be entered of record in court, which is to be done in the following manner, after the suggestion and the award of the writ of prohibition. Of entering the proof of the suggestion.

“ And the writ of the prohibition of the lord the king is granted to him,” &c.

“ Afterwards, that is to say, on the day of Form of entry.
“ In the twentieth year of the reign of our sove-
“ reign lord George the Third, of Great Britain,
F f 4 “ France,

" France, and Ireland king, defender of the faith, &c.
 " at in the county of before [the judge]
 " comes the said A. B. in his proper person, and to ve-
 " rify, testify, and prove his suggestion aforesaid, and
 " all and every matter and thing contained in the same
 " suggestion on the part of the said A. B. to be proved,
 " produceth three good, lawful, and sufficient witnesses,
 " to wit, O. P. of in the county aforesaid, hus-
 " bandman, and aged about twenty-four years, or there-
 " abouts; Q. R. of the same place, labourer, aged
 " sixty years or thereabouts; and S. T. of the parish of
 " in the said county, farmer, aged forty years
 " and upwards, before the said justice at afore-
 " said, according to the form of the statute in such case
 " made and provided: which said witnesses so as afore-
 " said produced by the said A. B. being then and there
 " sworn upon the holy Evangelists, to depose the truth
 " of and upon the premises specified in the aforesaid
 " suggestion, say and depose, and each of them sever-
 " rally upon his oath faith and depose in manner and
 " form following, that is to say, the said O. P. for him-
 " self, upon his oath faith and depose, that, &c.
 " [Here enter the proof of what he swears.] And the
 " said Q. R. for himself upon his said oath faith and de-
 " pose, that, &c. [Enter what he swears to.] And
 " the said O. P. and Q. R. for themselves severally
 " upon their said oath say and depose, that, &c. [Enter
 " what they both swear to.] And the said S. T. for
 " himself, upon his said oath, faith and depose, that,
 " &c. [The part he swears to.] Which said deposi-
 " tions taken before the said [the name of the judge],
 " in form aforesaid, the said justice afterwards, to wit,
 " in Michaelmas term, in the nineteenth year of the
 " reign of our said lord the now king, delivered by his
 " own proper hands, into the court of our said lord the
 " king of the bench, here to be enrolled of record.

" Sworn the day of } By me —
 " in the year of our Lord, 1795.

D.

D. Of verifying the Suggestion by Affidavit.

In some cases the courts require an *affidavit* to be
 made on application for a *prohibition*, to support the sug-
 gession.

gestion. Per Holt Ch. Just. B. R. in *Godfrey v. Llewellyn*, 11 W. 3. the bishop of St. David's case. Where the matter suggested for a prohibition appears upon the face of the libel, we never insist upon an affidavit; but unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears upon the face of the libel, to be out of their jurisdiction, you ought to have an affidavit of the truth of your suggestion. Salk. 549. pl. 3. *Eaton v. Burton*, Cow. 330.

When affidavit necessary where matter of suggestion does not appear on libel;

Upon motion for a prohibition, there must be an affidavit that the matter suggested to have been pleaded was pleaded below in the spiritual court, and disallowed; Vide Ld. Raym. 1211. for otherwise, any one might come and suggest a false fact, and so oust the spiritual court of their jurisdiction.

or to verify the truth of plea having been pleaded.

In *Hynes v. Thompson* (mentioned by Aston Just. in *Buggin v. Bennet*, Burr. 4 pt. 2039, 2040.), Lord Ch. Just. Lee laid down the rule to be, "That if you move for a prohibition upon any thing not appearing upon the face of the proceedings, you ought to have an affidavit of the truth of the suggestion." And he cited *Godfrey v. Llewellyn*, 2 Salk. 549. in point; and 2 Salk. 551, pl. 13. where Holt Ch. Just. laid down the law to be, "That wherever the matter which you suggest for a prohibition is *foreign* to the libel, you must plead it below, before you can have a prohibition; otherwise, where the cause of prohibition appears upon the libel." And Lord Ch. Just. Lee said, in that case of *Hynes v. Thompson*, that he thought it must either be pleaded "that there was such a custom," or an affidavit of it. And Mr. Just. Chapple hinted, that prohibitions had been too easily granted; and was of opinion, that there ought to have been an affidavit to verify the suggestion.

Matter foreign to the libel must be pleaded below, or verified by affidavit.

In *Driver v. Colgate* (mentioned also by Aston Just. in the same case of *Buggin v. Bennet*, Burr. 4 pt. 2039, 2040.), the court held, that there was no necessity to plead it below, in cases of prohibition for words spoken where they are by the custom actionable, as there is in case of a prohibition or suggestion of a *modus*. For in the former case, they cannot go on if the suggestion be true; but in the latter of a *modus*; if

Exception to the rule.

the

the *modus* be admitted in the spiritual court, they may go on, because the jurisdiction continues.

Which holds in all other cases.

In all other cases the court laid down a general rule, "that the matter must either be *pleaded* below, or verified by *affidavit*." Vide Burr. Rep. 4 pt. 2040.

Of the affidavit to verify the existence of a custom.

As in case for a prohibition to the consistory court of London, in a cause for calling a woman "*whore*" in London, there must be an affidavit of the *custom*, and also that the words were spoken there. *Theyer v. Eastwick*, Burr. 4 pt. 2032.

Consequence if no affidavit.

In C. B. on shewing cause why a prohibition should not be granted, it was objected, that no affidavit was filed, whereby the libel whereupon the plaintiff had moved, appeared to be a true copy. *Per Cur.* The objection is good. Rule discharged. *Eaglesfield v. Anderson*, Barnes, 427.

How plea must be tendered with affidavit annexed.

On a rule to shew cause why an *attachment* should not be granted against the mayor of Marlborough, for refusing to accept the defendant's plea in his court, it was held not to be sufficient for a defendant in a court below to bring his plea into court, and offer to make oath of the truth of it; but that he must tender his plea with an affidavit annexed of the truth thereof, and that this must be done before a general imparlance; but that he might have prayed a *special imparlance*, and then have come to the next court and pleaded. It was also held, that the proper way of proceeding was not by *attachment*, but that a *prohibition* should have been moved for; and so the rule for an attachment was discharged. *Vokens v. Cull*, B. R. Hil. 12 Geo. 2.

Ⓒ.

Ⓒ. Of granting the Prohibition.

Prohibition granted absolutely or *hoc usque*.

Meaning thereof.

Prohibitions are granted either absolutely, or *hoc usque* only till such an act be done. The first of these is peremptory, and ties up the inferior jurisdiction till a *consultation* is awarded; the second is *ipso facto* discharged upon complying with the act, and that without any writ of *consultation*. 6 Mod. 308.

When

When a prohibition is moved for because a copy of the libel is denied, the court requires that oath should be made of the denial, and the prohibition is only *quousque* the copy be delivered. Vent. 252. 2 Salk. 553. pl. 19.

The stat. 2 Hen. 5. stat. 1. c. 3. requires a copy of the libel in the ecclesiastical court to be given to the party sued there. But as this statute extends only to the ecclesiastical courts, a prohibition was denied to be granted to the admiralty court, upon a suggestion that they refused to give the party sued there a copy of the libel. Ld. Raym. 442.

A prohibition *quousque* they give a copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel; but after, they shall not proceed till they give a copy of it. 6 Mod. 308.

It was formerly held by all the judges, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles: but the law is otherwise; for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it. Ld. Raym. 991.

In C. B. a rule was made for civilians to be heard on both sides in relation to a prohibition. Dr. Lee attended to argue against the prohibition; but none would attend to argue for it, as by affidavit appeared. *Per Cur.* We ought to hear civilians on both sides, or not at all. Enlarge the rule; perhaps, when our opinion is known, a doctor may attend on the other side. Afterwards no civilian attending to argue for the prohibition, the court would not hear Dr. Lee against it. Barnes, 428.

A prohibition is not grantable the last day of term, but on motion, a rule may be obtained to stay proceedings till the ensuing term. Latch. 7. 2 Roll. Rep. 456.

Whether prohibition grantable last day of term.

But a prohibition to an ecclesiastical court was granted the last day of term on motion, leave having been obtained the day before, "to move it then." Burr. Rep. 4 pt. 1922.

J. Of

f.

f. Of declaring in Prohibition, &c.

Court generally orders a rule nisi,

The court seldom awards a *prohibition* upon the motion, but generally grants a rule *nisi*, or that the adverse party should shew cause why it should not be granted. Cro. El. 16. 94. 5 Mod. 247. Ld. Raym. 86. 236. Willf. Rep. 7. pl. 2.

and in nice cases directs plaintiff to declare.

Also in nice and difficult cases it is usual to direct the plaintiff to declare in *prohibition*; Cro. El. 736. 4 Mod. 151. Lev. 125. Ld. Raym. 88.—and so proceed to issue, that the merits of the cause may be brought before them with the greater exactness, and the court thereby be the better enabled to judge of the reasonableness of granting or refusing the writ. Stil. Pract. Reg. 43. F. N. B. 44.

How far plaintiff's declaring is matter of right on part of defendant,

When the court inclines to grant the motion for a prohibition, the defendant has a sort of right to insist that the plaintiff shall declare; but where the court inclines against the motion, the plaintiff has no such right, for there might be judgment by default, and the court be obliged to prohibit against their own opinion; and it is no injury to the plaintiff, as he may apply to another court. *The King v. the Bishop of Ely*, Mich. 30 Geo. 2.

So it appears, that leave to declare in prohibition is only granted when the court inclines to prohibit; not when it inclines to the contrary. Vide 1 Blackf. Rep. 81.

or in discretion of court.

The court is not obliged to give direction for such declaration, but are absolute judges of the sufficiency or insufficiency of the suggestion. Leon. 181.

When not directed.

Nor will the court put the party to declare in prohibition, if they are clearly of opinion against granting the prohibition, because the same application may be made to the other courts. *Lindo v. Rodney*, Doug. 620.

How to proceed when plaintiff is ordered to declare;

Where the party is ordered to declare in prohibition, he ought not to take out the writ, but serving the other side with a rule is sufficient; and if in that suit he obtain judgment, the judgment is *set prohibitis*, otherwise it

it is *quod eat consultatio*; therefore if the party be excommunicated, the mandatory part of the writ to affoil the party is not to be obeyed till after trial had. *The Dean and Bishop of Wells*, Mich. 25 Geo. 2. and of the judgment thereon.

In cases of tithes and such sort of matters where many things are in controversy, it is very frequent to order the prohibition to stand as to part, and a *consultation* to go as to the other part. Of prohibition standing as to part and consultation going to part.

If the declaration in prohibition varies from the suggestion, this is naught, and a *consultation* shall be awarded. 7 Mod. 113. Leon. 128. For the surmise is as the writ.

The declaration in prohibition is founded upon an attachment for a contempt, and therefore the declaration in prohibition is a *qui tam* declaration, for it supposes a contempt to the king in proceeding after the writ delivered. 12 Co. 61. But the contempt is but form, and the jury need not give any verdict about it. Stra. 482. Of the declaration in prohibition.

If the jury upon an issue joined in a prohibition *de modo decimandi*, find a different *modus* than that alleged by the plaintiff, yet the defendant shall not have a consultation; because it appears that he ought not to sue for tithes in *specie*, there being a *modus* found. Vent. 32.

The declaration ought to shew a place where the defendant proceeded, after the prohibition served; otherwise, the plaintiff shall not have judgment, though the writ of enquiry finds damages. 1 Vent. 348. 350. Ray, 387. 2 Jones, 128. 2 Show. 145. What declaration should contain.

Two persons cannot join in the declaration, where the cause of complaint is several. Cro. Car. 162. Of the parties thereto.

If the libel be against several parishioners, who all insist upon the same *modus*, they cannot join, but must have several prohibitions. Yel. 128. R. Raym. 425.

If there appears cause for a prohibition, there shall not be a consultation, though the declaration be defective for want of form; as because there is not the *profer* of a deed, or letters-patent. Per Coke. 1 Rol. 332. Of defects therein.
After

After a rule given to declare in prohibition, the defendant may submit and stay proceedings. Stra. 1149.

Of amending declaration.

The declaration in prohibition was ordered to be amended by a judge, but the amendment not being warranted by the suggestion, or the acts of the spiritual court, the order was discharged. Barnes, 7.

Of the issue, damages and costs.

Where an issue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than *one shilling* damages, for it is in nature of an issue to inform the conscience of the court. *Carter v. Leeds*, Mich. 2 Geo. 2. But after the plaintiff has had judgment *quod stet prohibitio*, he may bring his action upon the case, and recover the damages he has sustained.

Construction of statute of 8 & 9 W. 3. as to costs;

On shewing cause against a *prohibition*, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay the proceedings, as being willing to submit. The other insisted he had a right to go on, and so get at the *costs* of the motion, which he could not otherwise have; but the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it. *Gegge v. Jones*, Stra. 1149. [Vide the statute 8 & 9 W. 3. c. 11. s. 3. which gives costs in prohibition upon plaintiff's obtaining judgment, or any award of execution after *plea pleaded or demurrer joined*]; but the plaintiff can recover no costs in prohibition, unless he has execution after *plea or demurrer*, and judgment for him, but then after such judgment and execution; after *plea or demurrer*, the costs shall be taxed from the suggestion, so as to take in the motion. *Wills v. Turner*, Hil. 2 Geo. 1. C. B. 2 Crom. 273.

and from what time to be taxed.

How if plaintiff has declared and defendant does not proceed.

It was at the defendant's instance made part of the rule whereby a writ of prohibition was granted, that the plaintiff should declare in prohibition. Defendant afterwards demanded a declaration, and threatened a *non pro* for want thereof. Whereupon a declaration was prepared: and when it was ready, he was told by defendant's agent that he need not deliver it; but as he had been at the trouble and expence in preparing it, he delivered the

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the same, and called for a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Whereupon plaintiff applied to the court, and obtained a rule for defendant to shew cause, why he should not pay the plaintiff's costs of the proceedings in prohibition. Which rule was made absolute. The court looked on the plea to be a sham nugatory plea, and not to the merits of the cause: the allegation, that defendant has proceeded contrary to the prohibition, is and must be put into every declaration of this kind: but whether he has so proceeded, or not, is totally immaterial. The stat. 8 & 9 W. 3. c. 10. s. 3. gives costs after plea or demurrer: but this is not a plea within the statute. *Seed v. Wolfenden*, Bar. 148.

Since the 8 & 9 W. 3. c. 10. giving plaintiff in prohibition, obtaining judgment, or any award of execution after plea or demurrer, his costs, it has been held, that these costs commence from the *suggestion*, which is taken to be the commencement of the suit, in lieu of an original writ in prohibition; and if a feigned issue is directed, and found in plaintiff's favour, he shall have the costs of that too. *Palmer v. Williams*, Clerk. Barnes, 130.

From what time costs commence.

The stat. 8 & 9 W. 3. extends only to cases after plea pleaded, or demurrer joined; but if there be judgment by default, and the plaintiff have damages on a writ of inquiry, for the contempt in proceeding after the prohibition delivered, (which is confessed by the default,) he will be entitled to costs at the common law. However, as this part of the declaration is no more than *form*, costs are allowed only from the time of a rule for prohibition. *Sir E. Bettison v. Dr. Hinchman*, Mich. 7 Geo. 1. C. B.

Cases within the statute.

After a verdict for defendant in prohibition as to part, the question was, whether he should be allowed costs pursuant to the statute Will. 3. or not? In *quare impedit*, if defendant has judgment, a writ is awarded to the bishop: in *replevin*, a writ of *retorn. habend.* and costs are given to the avowant, in some cases, by the stat. 21 Hen. 8. In *prohibition*, by 4 Jac. 1. a consultation

Of costs after verdict.

tation is given, and since the stat. Will. 3. costs, &c. if verdict, &c. pass against the plaintiff. Rule that judgment be entered, for a consultation as to part, and for costs. The *poslea* was agreed to be altered, with respect to finding that plaintiff proceeded in the spiritual court after the writ of prohibition delivered to him, which is material. *Maltam qui tam v. Acklam & al.* Barnes, 138.

¶

¶. Of the Writ of Consultation.

Its nature.

A writ of *consultation* is so called, because, upon deliberation and consultation had, the judges find the *prohibition* ill founded; and therefore by this writ, they return the cause to its original jurisdiction, to be there determined.

When consultation will be granted or not, and by whom, and of the consultation as to part.

If a prohibition be granted without notice to the other party, and upon motion it appears that there was no cause for it, the court will grant a *consultation*, without putting him to declare upon the prohibition. Cro. Car. 97.

So, after a prohibition granted, if upon trial the matter be found for the defendant, generally, a *consultation* shall go.

So, if the matter found for the defendant varies in words, but not in substance, from the suggestion; as if the suggestion be, that *two thirds of the tithes* belong to the plaintiff, and the verdict is *two entire parts of all tithes*.

So if there be a material variance between the suggestion for a prohibition, and the libel in the spiritual court, there ought to be a *consultation*; for the prohibition ought to be founded upon the libel; as if the libel be for tithes of corn, and a *modus* be suggested for tithes of hay, upon demurrer to the declaration in prohibition, a *consultation* shall go. Yel. 79.

So if there be a variance in quantity, as if the libel be for two hundred faggots of wood, and the suggestion be for twenty only. Yel. 79.

So

So, after a prohibition granted, if it appears that the spiritual court has consuance for part, a *consultation* shall go *quoad*, &c. 12 Co. 44.

So, if after a prohibition granted it be not served till sentence and appeal, it cannot be afterwards used. Cro. Jac. 429.

But a *consultation* shall not be granted except in term. 12 Co. 41.

Nor by a judge, but only in court. *Ibid.*

Nor after a declaration upon a prohibition, it shall not be granted upon motion before *plea* or *demurrer*. Cro. Car. 238.

Nor shall a *consultation* go, where a verdict is found for the defendant, if it appears upon the whole matter that the spiritual court has no consuance; as if a prohibition be upon a suggestion, that all lands in *A.* are discharged by a *modus*, and there is a verdict for the defendant, because it is found that all, except *ten acres*, are within the *modus*; yet a *consultation* does not go for such mistake in the issue, if the libel was not for tythes of the ten acres. 2 Rol. 320. l. 5. 15. Hob. 192.

So, if the suggestion was of unity, *ratione cujus* he shall be discharged, and a verdict finds that he shall not be discharged *ratione inde*; though it be against the plaintiff, yet being impertinent, for the fact to be tried was, whether there was an unity, &c. a *consultation* does not go. 2 Rol. 320. l. 35. 11 Co. 15.

So, though there be an immaterial variance between the suggestion and the libel, a *consultation* does not go: as if the suggestion be for a total discharge upon the stat. 31 Hen. 8. and recites the libel to be for twenty faggots, where it was for two hundred; for it was not material for what quantity the libel was, when the plaintiff claims a discharge for the whole. Yel. 75.

So, if the suggestion varies in quantity from the libel, if it be conformable to the copy of the libel delivered by
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the spiritual court, this variance shall not be a ground for a *consultation*. 2 Rol. 329. l. 45.

So, though the *modus* be not proved, as laid by the plaintiff, although there must be a verdict for defendant, who is entitled to costs; yet, if any *modus* be found, though different from that laid, the court will refuse a consultation. *Brock v. Richardson*, 1 D. & E. 427.

A writ of consultation is to the following effect:

Form of writ of
consultation.

“GEORGE the Third, by the grace of God, of
“Great Britain, France, and Ireland king, defender of
“the faith, and so forth. To the right worshipful J. C.
“master of arts, vicar general, and principal official of
“the episcopal or consistorial court of _____, &c. Whereas
“C. D. lately in the court christian before you im-
“pleaded A. B. by the name and description of A. B.
“of the parish of _____ in the county of Devon, for
“this, that by the laws, &c. (Here set forth the substance
“of the libel) as by the libel of the said C. D. amongst
“other things more fully appears. And whereas the
“said A. B. has lately prosecuted and caused to be di-
“rected to you our certain prohibition out of our
“court, before our justices at Westminster, that you
“should no farther hold the plea aforesaid, in the court
“christian aforesaid, before you or any thing farther
“in that behalf attempted, by pretence of which our
“said prohibition you have from thence hitherto de-
“layed, and yet do delay further to proceed in the
“cause aforesaid, as we have understood, to the great
“damage of the said C. D. and to the manifest preju-
“dice of the ecclesiastical liberty. Wherefore the said
“C. D. hath in our court, before our said justices at West-
“minster, humbly besought us to grant him our aid and
“assistance in this behalf; and we favourably consent-
“ing to the petition of him the said C. D. and being
“unwilling that the cognizance, which to the ecclesiastical
“court in this behalf belongs, should be further
“delayed by such false and subtle assertions; because
“in our said court, before our said justices at West-
“minster, it is in such manner proceeded, that it is
“considered by the same court, that the said C. D. may
“have our writ of consultation to the court christian
“aforesaid,

"afore said, our said writ of prohibition to the contrary
 "thereof notwithstanding, whereof the said A. B. is
 "convicted, as it appears to us on record. We there-
 "fore, being unwilling that the said C. D. should be in
 "any wise injured in this behalf, signify to you, and
 "command, that you may in that cause lawfully pro-
 "ceed, and further do what you shall know to belong
 "to the ecclesiastical court, our said prohibition to the
 "contrary thereof before to you directed in any wise
 "notwithstanding.

"Witness Sir James Eyre, knight, at Westminster,
 "the day of," &c.

When the court grants the writ of *prohibition*, such writ is not absolutely final and conclusive, even in ordinary cases. For though the ground be a proper one in point of law, for granting the *prohibition*, yet, if the *fact* that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction. If, for instance, a *custom* be pleaded in the spiritual court, a *prohibition* ought to go, because that court has no authority to try it; but if the fact of such a custom be brought to a competent trial, and be there found false, a writ of *consultation* will be granted. And for this purpose it is, that the party prohibited may appear to the *prohibition*, and take a declaration, (which must always pursue the suggestion,) and so plead to issue upon it; denying the contempt, and traversing the custom upon which the *prohibition* was grounded; and if that issue be found for the defendant, he shall then have a *writ of consultation*.

Of the effect of the prohibition when granted;

and in what cases it is not final.

D. Of granting a Prohibition after a Consultation awarded.

By the 50 Edw. 3. c. 4. "It is ordained and stablish-
 "ed, That where a consultation is once duly granted
 "upon a prohibition made to the *judge of the holy church*,
 "that the same judge may proceed in the cause by
 "virtue of the same consultation, *notwithstanding any*
 "other prohibition to him thereupon delivered: Provided
 "always, that the matter in the libel of the said cause
 "be not engrossed, enlarged, or otherwise changed."

Statute 50
 Edw. 3.
 Construction
 thereof.

Judge of holy church means spiritual judge; and therefore this statute extends not to the court of admiralty. 2 Brownl. 35.

Same judge means ecclesiastical judge in general, or person competent, and not to the same individual person. Pop. 159. Palm. 418. Latch. 6. 75.

This statute hath been construed to extend to those cases only, where a *consultation* hath been lawfully granted, that is, upon the right and merits of the thing in question, and not to such cases where, for defect of form, misprision of a clerk, mispleading an act of parliament, &c. consultations have been awarded. 2 Brownl. 26. 247. Leon. 130. 3 Bulst. 182. Moor, 917.

No prohibition after consultation;

And therefore regularly, where a consultation was awarded upon the merits, the party shall not have another prohibition upon the same suggestion.

Though he appeals, and then prays another prohibition. R. Pop. 159. Lat. 6. 1 Rol. 378. Moor, 919.

Though the consultation be granted by another court. Cro. El. 277.

And though he varies in the *modus* upon which the former prohibition was had. 1 Rol. 378.

except it issued for want of form in suggestion;

But if a consultation was awarded for want of form in the suggestion, or proceeding thereon, another prohibition may be allowed. Cro. Car. 208.

or for want of proof of suggestion;

So, if the consultation was awarded for want of proof of the suggestion within the *six months*, pursuant to the statute 2 & 3 Edw. 6. the plaintiff is not precluded, but may bring another prohibition (but then he must pay *double costs*, according to the statute, Carth. 463.); for this statute of Edw. 3. goes to the suggestion made upon the same libel, and to a consultation duly granted, and not to the case of not having witnesses ready to prove the suggestion through negligence. But it was said by Holloway, just. that after a consultation awarded for not proving his suggestion, &c. the party shall be for ever barred.

barred from having another prohibition on the same libel. Comb. 63.

But if, after a consultation for want of proving his suggestion, the party appeals, there may be another prohibition to the court, to which the *appeal* was, upon the same suggestion. 2 Rol. 500.

So, if after a consultation the libel is enlarged or changed. 2 Rol. 207. or if libel be afterwards changed;

So, if a consultation goes for a *collateral* matter, as if the plaintiff was nonsuited. Com. Dig. 4 vol. 484. But. Keb. 285. If upon the trial of a suggestion, the plaintiff be nonsuit, no new prohibition shall be granted, although the nonsuit was occasioned for want of some of the plaintiff's witnesses, who were to prove the truth of the suggestion, and who were necessarily obliged to be absent.

But where the suggestion was for a *modus* of tythe of lambs in the parish, and a consultation went, another prohibition shall go upon a suggestion of the same *modus* in a *particular farm*. 2 Vent. 47. This case is reversed there.

So, if a consultation goes, and there be afterwards a new libel for the same species of tythes in another year, a prohibition shall go upon the same suggestion as was tried before. Yel. 102.

And if a consultation goes, and the party against whom appeals; the appellee may have a prohibition, though the *appellant* cannot have it. Pop. 159. or appeal made;

So if, after a consultation, the plaintiff pleads the same matter (which was suggested and found against him at common law) in the spiritual court, which is accepted, and proceeds there for a trial, the former defendant may have a new prohibition: for they cannot try, in the spiritual court, a matter determined at a trial at law, which was proper to be there tried, as if a discharge within 31 Hen. 8. was suggested. 2 Rol. 319. l. 45. Hob. 286. or plaintiff pleads what has been tried at law;

or if it were
only a prohibi-
tion hoc usque.

If the ecclesiastical court refuse to grant a copy of the libel for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cause, the matter not being *within* their jurisdiction, another prohibition lies. Moor, 917.

How if defend-
ant dies.

If the defendant in prohibition dies, his executors may proceed in the ecclesiastical court, and the judges of the court out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed: but then the plaintiff may, if he pleases, have a new prohibition against the executors. Lil. Rep. 155.

3.

3. Of Disobedience to the Writ of Prohibition.

Of the disobe-
dience to writ
of prohibition,
and how pun-
ished.

The disobeying a prohibition is a contempt to the superior court that awards it, and punishable by *attach-ment*, which issues against the judge and party for proceeding after such prohibition, and for which they are subject to fine and imprisonment, according to the direction of the superior court. F. N. B. 40. Bro. tit. Pro. pl. 5. 9. 11. and 279. Though the writ was not directed to the party. 19 Hen. 6. 54. And such attachment may be awarded against a peer of the realm, 21 Edw. 3. 3 pl. 7.

Of the attach-
ment.

An *attachment* was granted upon an affidavit that the party proceeded after a prohibition delivered to him, in a suit for a seat in the church, which the plaintiff claimed by *prescription*; and upon his appearance and examination upon interrogatories, he confessed the matter, and was fined five marks. Dr. Wainwright's case, 2 Jon. 47.

And not only an *attachment* lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as if a person libels for tythes, and a prohibition is brought, and he libels for tythes of another year, the first not being determined, an *attachment* shall be awarded. Leon. 111. Moor, 599.

And

And in an *attachment* upon a prohibition, the plaintiff shall recover damages and costs against the party, for proceeding after the writ of prohibition awarded. Cro. Car. 559. 2 Jon. 128. Vent. 348. 3 Lev. 360.

Note; In the cases of *prohibitions*, where they were granted on motion, the ancient course was, that the party prohibited sued out a *scire facias quare consultatio non debet concedi post prohibitionem*; in which writ the suggestion was recited, and also a prohibition granted thereon, *ad damnum* of the party; afterwards this practice was altered, and the course came to be thus: (*viz.*) Upon granting a prohibition to the plaintiff, the court bound him in a recognizance to prosecute an *attachment of contempt* against defendant, for suing in the spiritual court after a prohibition granted, and then to declare upon the prohibition. So that he who was the defendant in that court, is now become actor or plaintiff in the court above,

Of the ancient practice in such cases;

and how altered.

C H A P. XIX.

AS there are some detached heads of practice not immediately connected with any particular action; but in a great measure applicable to all, it was thought proper to arrange them in a distinct chapter.

SEC. 1. *Of discontinuing the Action.*

SEC. 2. *Of entering a Noli Prosequi,*

SEC. 3. *Of the Retraxit.*

SEC. 4. *Of Staying Proceedings on Payment of Debt and Costs.*

SEC. 5. *Of the Statutes of Limitation, and suing out Writ to save the Statute.*

SEC. 6. *Of discharging Debtors under the Lords Act.*

SEC. 7. *Of Summons and Motions.*

SECTION I.

Of discontinuing the Action.

Discontinuance when necessary, If the plaintiff, after the commencement of a suit, wishes to proceed no further therein, either from the action not being maintainable, or from the form of action being misconceived. or the wrong parties having been sued, or from any other cause, he may *discontinue* the suit, and afterwards begin again *de novo*, or not, as he thinks fit.

How if no proceedings, nor discontinuance.

But should he neither proceed in due time, nor regularly *discontinue*, defendant may obtain judgment of *non pros* against him; or, should the plaintiff bring a second action for the same cause, without having discontinued the first, defendant may plead *auter action pendent*, and plaintiff will be saddled with the costs.

Whenever

Whenever plaintiff discontinues, it is upon payment of costs. Stat. 8 Eliz. c. 2. sec. 2.

Terms of discontinuance.

Executors and administrators pay costs of discontinuing where they have knowingly brought their action wrong; but not otherwise. Burr. 1451. 1584. 1923. Bar. 169. 1 Blac. 451.

As to Executors, &c.

An avowant in replevin, cannot discontinue; for though he is an actor in law, yet it is the plaintiff's suit. Str. 112.

Avowant cannot discontinue.

Plaintiff may discontinue, as a matter of course, any time before verdict or judgment on demurrer. 1 Sal. 178. Bar. 307.

When discontinuance may be.

And even after judgment on demurrer. plaintiff upon motion in court, may sometimes get a rule to discontinue.

How after judgment on demurrer;

But this depends much upon the nature of the case, and of the demurrer; for, in general, where the question determined on the demurrer, goes to the merits of the action, the court will not give leave to discontinue. *Turner v. Turner*, 2 Lord Ray. 856. 1 Sal. 179. But there are cases both ways; see *Henderson v. Williamson*, Str. 116. *Butler v. Masfiffy*, Str. 76. & 3 Leo. 440.

After judgment on demurrer, (but not entered on record,) and writ of error brought, plaintiff had leave to discontinue on paying costs on writ of error. *Pym v. Warren*, Bar. 169.

The court will never grant leave for plaintiff to discontinue after a *general* verdict, which is final; but after a *special* one it has been done. 1 Sal. 178.

or general verdict;

or special;

Nor after writ of inquiry executed and returned. Carth. 86.

or writ of inquiry.

Unless the defendant consents thereto; the reason is, because if the plaintiff will not enter up judgment, defendant may. 1 Sal. 178.

Of defendant's consent.

If

How, if action
be against a
justice.

If the action be against defendant as a justice of the peace in the execution of his office, and plaintiff moves to discontinue, defendant may make an affidavit of the fact, upon which court will make it part of the rule that plaintiff shall pay double costs. Though in case of a verdict of nonsuit, it must be done by way of suggestion. Str. 974.

Manner of dis-
continuing.

If discontinuance be by *side-bar* rule, which is of course before verdict or argument on demurrer or execution of inquiry; get rule—

K. B.

Of clerk of rules.—Carry it to the master; get appointment thereon for taxing costs; serve copy thereof on defendant's attorney, at the time fixed; master will proceed to tax costs whether defendant's attorney attend or not.

C. B.

Of secondary.—Get appointment from probonotary to tax costs; serve copy thereof on defendant's attorney; if no attendance, repeat the service three times; costs will then be taxed.

The rule is only *conditional*, and does not stay proceedings till the costs are paid.

If discontinuance be by motion in court, it is a rule *nisi*; if made absolute, get rule of clerk of rules and proceed as above.

Another kind
of discon-
tinuance.

There is another species of discontinuance which it may be proper to notice here, termed a discontinuance of *process*, the former being a discontinuance of the *action*.

Discontinuance
of process, what.

This is somewhat similar to a *non pros*, for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and term to term, as he ought to do, the suit is discontinued and the defendant is no longer bound to attend; but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist. 3 Blac. Com. 296.

How continu-
ances entered.

Before declaration there is, properly speaking, no continuance, though the parties by consent might have obtained a day called *dies datus prece partium*. After declaration,

claration, and before issue joined, the proceedings are continued by *imparlance*; after issue joined, and before verdict, by *vicecomes non misit breve*; and after verdict or demurrer, by *curia advisare vult*. Tidd. 419.

But the necessity of entering these continuances is now nearly at an end, since the want of a continuance is aided by the appearance of the party. *Wynne v. Wynne*, 1 Will. 40. Nor can the objection be made *pendente placito* before judgment, for it may be continued at the pleasure of the court, *Beechey v. Sir Thomas Shirley*, Cro. Jac. 211. And after judgment it is aided by the statutes of Jeofails. 32 H. 8. c. 30. 4 & 5 Ann. c. 16. *Smith v. Bower*, Cro. Jac. 528.

Necessity of entering them taken away.

Formerly all suits depending at the time of the demise of the king were thereby discontinued, but it is now otherwise by stat. 1 Edw. 6, c. 7.

No discontinuance by demise of the king.

SECTION II.

Of entering a Noli Prosequi.

Another way by which a plaintiff may put an end to the proceedings is, by entering a *nol. prof.* as it is called, upon the record, which is as follows: "*Et predictus A. B. per T. S. attornat. suum venit hic in curia, & fatetur se nolle ulterius prosequi, ideo conceditur quod defendens eat inde sine die.*"

The nature of a *nol. prof.*
Form of entry.

When the *nol. prof.* goes to the whole cause of action, it operates in effect as a *retrahit*. And such judgment of *nol. prof.* could be pleaded in bar to a new action for the same cause. *Beecher v. Sir Thomas Shirley*, Cro. Jac. 211. But otherwise it may differ from a *retrahit*, and be only a relinquishment of part not of the whole suit, 1 Will. 90.

Its operation.

For the plaintiff may enter a *nol. prof.* either as to the whole action, or only as to part of the action of the defendants.

May be entered as to the whole or part of action.

Thus

Thus where plaintiff, after declaration, discovered defendant to be an infant, he entered a *nol. prof.*

Plaintiff must pay costs.

But in such case the court look upon it as a discontinuance so far as to render the plaintiff liable to costs under 8 Eliz. c. 2. s. 2. *Cooper v. Tiffin*, 3 D. & E. 511.

How, if entered as to part.

Plaintiff, instead of entering a *nol. prof.* as to the whole, may only enter it as to part of the cause of action, or to one of the counts in declaration.

In case of demurrer to some counts;

But if there are several counts in a declaration, and defendant demurs, shewing for cause that the counts are improperly joined, plaintiff cannot enter a *nol. prof.* as to some of the counts, and join in demurrer as to the other. *Rose and Mercy & Ux. v. Bowler and others*, 1 H. Blac. 108.

Nor where there are two counts, and demurrer to one, because one of the defendants was not named in the last count, can plaintiff enter a *nol. prof.* on that count and proceed on the other. *Drummond v. Dorant*, 4 D. & E. 360.

or issue and demurrer.

But if there is issue upon part and demurrer on part, if demurrer be first argued, and judgment for plaintiff, he may enter a *nol. prof.* as to the issue, and proceed to writ of inquiry on demurrer. Sal. 221.

But if issue be tried first, the *venire* goes *tam* to try *quam* to assess contingent damages on demurrer.

When such *nol. prof.* to be entered.

The *nol. prof.* in the first case may be entered at the time of entering final judgment. *Fleming v. Langton*, Str. 532.

How, if against some defendants where there are many.

As plaintiff may enter a *nol. prof.* as to part of the cause of action, so he may as to some of the defendants where there are many.

In assumpsit, where defendants sever.

Thus where two defendants in *assumpsit* sever in pleading, and one pleads a special plea, as bankruptcy, which, on issue joined is found for him, plaintiff may enter a *nol. prof.* as to him, and proceed to final judgment

judgment and execution against the other. Doug. 169. n.

But this can only be done in *assumpsit* or actions on contract, where the plea of such defendant merely goes to his own *personal* discharge, not if it were a plea that went to the merits of the action itself. *Noke* and another v. *Ingham*, 1 Will. 89.

Nor unless he severs in pleading, because it is on a joint contract.

But in actions of trespass or tort, it is different; for torts are *several*, and plaintiff may at any time enter a *nol. prof.* as to one defendant and proceed against the rest, provided it be entered before final judgment. *Lover v. Salkeld*, Sal. 456.

In torts and trespass, must be entered before final judgment.

SECTION III.

Of the Retraxit.

But besides the above entry of a *noli prosequi* there is another way of a plaintiff getting rid of a suit, which is by making a *retraxit*. This may be done when the trial is called on by a plaintiff coming in person into court where his action is brought, and saying he will not proceed in it. It is so called from the form of the entry. "*Et predict. quarens in propria persona sua venit & dicit quod ipse placitum suum pred. versus pred. defenden. ulterius prosequi non vult sed abinde omnino se retraxit.*" A *retraxit* must be always in person; if it is by attorney, it is error. 8 Rep. 58. 3 Salk. 245.

Retraxit, what.

Form of entry.

How made.

A *retraxit* differs from a nonsuit, in that the one is negative and the other positive; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he ever loses his action. 3 Blac. Com. 296.

Wherein it differs from nonsuit;

A retraxit

or a *nol. prof.*

A *retraxit* also differs from a *nol. prof.*; but in its operation is mostly similar to a *nol. prof.* entered to the whole cause of action, as has been shewn above. Cro. Jac. 211.

SECTION IV.

Of staying Proceedings on Payment of Debt and Costs.

When defendant may stay proceedings by paying debt and costs.

The above three sections of this chapter have shewn in what manner the *plaintiff* may put an end to the suit, by discontinuing, entering a *noli prosequi*, or a *retraxit*; but in many actions the *defendant*, if he is convinced of the justice of the plaintiff's claim, and wishes to prevent the expence of further proceeding, may also stop the proceedings, by paying the debt and costs. I say in many actions, because it cannot be done in all, but in those only which are brought for any specific debt or sum of money due, and when the amount of the demand is fixed or agreed upon by the parties; for whenever the *quantum* of the demand is disputed, the judge and court will not enter into the merits, but the parties must settle it before a jury. So in all actions for damages only, for any breach of agreement or tort, or trespass or the like, the amount of which a jury only can ascertain.

But if it is a specific debt, defendant may take out a summons before a judge, for plaintiff to shew cause why, upon payment of the debt and costs of the action, all proceedings should not be stayed.

Use of getting particulars of plaintiff's demand;

This leads me to notice the use and propriety, in many cases, of the modern practice of obtaining a judge's order, now granted of course for plaintiff to give in the particulars of his demand; for in obedience to this order, the plaintiff must specify the *items* for which he brings his action, mentioning dates and sums, by which means defendant is enabled to know the justice of the demand, and either to stay the proceedings by paying the whole, if the whole is due, or by paying so much

as he thinks due, into court; nor can the plaintiff upon the trial go out of the particulars, by giving evidence of any items not mentioned therein.

In the same way, if defendant pleads a set off, plaintiff may obtain an order for him to give in the particulars of his set off, and thus be prepared with evidence to contradict it. or defendant's set off.

But as this is but a modern practice, and an indulgence to the party demanding the particulars, the court will not hold a very tight hand over the party giving it, unless they have reason to think that false particulars were given in purposely to mislead.

Thus, where the particulars of plaintiff's demand as given in under a judge's order were for cash received of Hammersleys and Co. 37*l.* it appeared in evidence that 25*l.* was cash paid by Hammersley and Co. to defendant, but the remainder was the amount of a bill which had become due, but was not paid, which bill belonged to plaintiff, which Hammersley and Co. gave to defendant, defendant afterwards brought an action against an indorser of the bill, and recovered; it was objected that no evidence of this bill and of the action could be given under the above particulars; but C. J. Eyre held, that if plaintiff could shew defendant turned this identical bill into cash, evidence thereof might be given under the particulars, as cash received from the bankers, and that he would not be too rigid in this respect. *Vaughan v. Thatcher*, Mich. Sitt. C. B. Guildhall, 1795. Not to be too rigidly adhered to.

It is to be observed, that the staying proceedings by paying the debt and costs, is wholly distinct from the paying money into court; the latter is a matter of right, which, in certain cases, defendant may do without consulting the plaintiff, and the plaintiff is afterwards at liberty to proceed for a further sum, but the former is putting a complete end to the suit, by the full demand being satisfied, and the costs of the action paid, and can only be done by a rule of court or an order of a judge, served upon the plaintiff for that purpose, who may shew cause against it if he thinks fit.

SECTION V.

Of the Statutes of Limitations, and suing out the Writ to save the Statute.

Reason of the statutes of limitation.

As well from the motive of "quieting men's estates" and avoiding of suits," as also upon the principle that *vigilantibus non dormientibus jura subveniunt*, have the different statutes of limitation been passed. If therefore a plaintiff, through negligence or indolence, hath delayed prosecuting his claim, however just in its nature, beyond the time limited by the statute, such fact may be pleaded, and will be an effectual bar to the action.

The statutes, however, have provided (as hereafter mentioned) against certain circumstances, which, without any laches or default of plaintiff, might prevent him from commencing his suit in due time.

Of the Times limited by the Statutes for bringing Actions.

Of the times limited for the different actions.

Actions must be respectively brought within the following times, to be reckoned from the period when plaintiff is by law entitled to bring such action:

<i>Actions.</i>	<i>Statutes.</i>	<i>Years.</i>
Writ of right. - -	32 Hen. 8. c. 12.	60
Formedon and ejectment.	21 Jac. I. c. 16.	20
Actions upon the case (except slander).	21 Jac. I. c. 16.	6
Actions upon account (except accounts between merchant and merchant).		
Actions upon trespass (except assault and imprisonment). - -		
Actions upon debt, if not upon a specialty. - -		
Actions upon detinue. ----- replevin. }		

Actions

<i>Actions.</i>	<i>Statutes.</i>	<i>Years.</i>
Actions upon trespasses for assault, battery, and false imprisonment. - - }	21 Jac. 1. c. 16.	4
Actions upon slander for words. - - }	Ibid.	2
All <i>qui tam</i> actions (except the statute of tillage). }	31 Eliz. c. 5. f. 5.	1

In all cases if judgment be obtained by plaintiff, and it is afterwards *reversed on error* or *arrested* upon motion; or if defendant be *outlawed*, and outlawry afterwards reversed, plaintiff or his representative must commence a new action within a year from that time.

Of the Provision in the Statutes:

Provided, that if the person entitled to such action be, at the time the cause of action arises or accrues, *within the age of twenty-one, feme covert, non compos mentis, imprisoned, or beyond the seas*; or provided the person against whom the action is to be brought be at that time beyond the seas; in such cases plaintiff may bring his action at any time within the above limited periods after such impediment is removed.

Exceptions in the statutes
21 Jac. 1. 4 & 5
Ann.

To enter into a detail of the cases adjudged upon the above statutes would far exceed the limits of this work. For the general reading thereon the student is referred to the various abridgments and books upon the subject; a few of the latest decisions only being here subjoined.

Of the Exception as to Plaintiffs being abroad.

Where there is a joint cause of action, if one of the plaintiffs be abroad and the others in England, the action must be brought within six years after the cause of action arises; for, as where several persons are debtors, the acknowledgment by one is sufficient to take the case out of all out of the statute of limitations; so when they are creditors, the ability of one to sue for all takes such case out of the proviso of the statute. *Perry and others v. Jackson and others*, 4 D. & E. 516.

Construction of the statutes.
How if one plaintiff be in England and the others abroad;

or if plaintiff
be a foreigner
residing abroad.

The exception in the statute is general; so that a foreigner always residing beyond the sea may reply that fact to a plea of the statute. *Strithorst v. Grame*, 2 Blac. 723.

As to the Time from whence the Statute attaches.

At what time
the statute be-
gins to run.

On a mere loan of money, the time of limitation commences from the date of the loan; but where the money is lent on a special contract for repayment, it is the time of the repayment that fixes the period of the limitation.

So that on a bill of exchange, the statute begins to operate only from the time when the bill became due. *Wittersheim v. the Countess of Carlisle*, 1 H. Blac. 631.

Of the acknow-
ledgment of
debt taking case
out of statute.

But although six years have elapsed since the cause of action accrued, yet if within the six years the defendant has made any acknowledgment of the debt being due, or any promise to pay, this takes it out of the statute.

Receiving divi-
dend under
commission on
acknowledg-
ment;

One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission, on account of the note, within six years before the action brought; this is such an acknowledgment of the debt as will prevent the other maker from availing himself of the statute in an action brought against him for the remainder of the money. *Jackson v. Fairbank*, 2 H. Blac. 340.

or any item be-
ing within six
years on a mu-
tual account.

So, if there be a mutual account of any sort between the parties, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account, and of a promise to pay the balance, so as to take the case out of the statute. *Catling and another, executors, v. Skoulding and another*, 6 D. & E. 189.

Of this acknowledgment the jury are to judge.

Acknowledg-
ment is matter
of evidence for
a jury.

So that a letter written by a defendant to the plaintiff's attorney on being served with a writ, neither expressly admitting nor denying the debt, should be left to the

the jury to consider whether it amounts to an acknowledgment of the debt so as to take it out of the statute. *Lloyd v. Maund*, 2 D. & E. 1760.

There may also be cases which *fraud* will take out of the statute of limitations. *Bree v. Holbeach*, Doug. 654. Fraud will take case out of statute.

Of suing out Process to save the Statute.

As the statute of limitations when it attaches is an absolute bar to plaintiff's action, provided the defendant chooses to avail himself of it; it is often expedient for the plaintiff (although he may not at the time wish to proceed hostilely with the suit) to make a *commencement* of it, by actually suing out *process*, and getting it returned and entered upon the roll within the period (according to the nature of the action) limited by the statute. This is said to *save* the statute; because, if at any time afterwards plaintiff is under the necessity of prosecuting the suit, he may sue out an *alias* writ founded upon the first writ or process, and proceed in his action; and should the defendant (not aware of this step having been previously taken) endeavour to take advantage of the statute of limitations by pleading it, plaintiff may reply such first writ so sued out within the six years, and continued with the proper continuances on the roll; which continuances may at any time be entered thereon, and thus prevent the operation of the statute. Reason and use of suing out process to save the statute.

In order to save the statute, it is necessary that the writ should be *bona fide* sued out in *time*, for it will not do by relation, (as if the time expired in the vacation, and afterwards in the same vacation the writ is sued out *tested* the last day of the preceding term,) for the defendant may in his rejoinder set out the true time on which it issued. 1 Blac. 215. Otherwise, perhaps, it might avail. *Ld. Ray.* 432. 386. 880. 553. How and at what time writ should be sued out.

It must also be regularly continued; that is, the same writ must be continued, so that it may appear that *the plaintiff is proceeding to bring the defendant into court on the suit originally commenced.* How it should be continued.

If therefore a bill of Middlesex be sued out, and continued down to a certain time, and then the plaintiff sued out Same process must be continued.

out an attachment of privilege; that will not be a continuance of the former writ, as it has no connection with it, and therefore will not save the statute. *Smith v. Boyer*, 3 D. & E. 662.

What process is good for this purpose.

But an attachment of privilege, if sued out in the first instance, is a sufficient commencement of an action to avoid the statute, and may be afterwards properly continued. *Leadbeater v. Markland*, 2 Blac. 1131.

So is a *latitat*, without a bill of Middlesex previously issuing, or a *capias* without an original. Str. 736. 2 Blac. 925, *Leader v. Moxons*.

Or it may be by bill of Middlesex, or original.

So a bill may be filed in vacation against an attorney to save the statute. Doug. 313.

Or an original against a member of parliament may be sued out to save the statute. Lev. 111. Sal. 512. Ld. Ray. 1113.

This process and continuances must be specially replied.

Whenever a writ is sued out to save the statute, and defendant pleads the statute, plaintiff must reply the special matter; it cannot be given in evidence.

So that the plaintiff to such plea, instead of tendering issue, must reply a *latitat* (or the like), sued out at such a time, and that the same was returned, and then shew the proper continuances down to the time of suing out the process upon which the defendant actually was brought into court; averring, that the first process sued out and returned was sued out with a view to exhibit his bill (or the like), or declare for the same identical cause of action, and that the same was sued out within the time limited by the statute. Salk. 420.

Informal process continued.

If the process at first sued out be somewhat informal, as when an attachment of privilege was made returnable on a general return, court will overlook it for plaintiff to save the statute, provided it be afterwards properly continued. 2 Blac. 1131. 3 D. & E. 662.

How to sue out Procefs, and make Entry on Roll.

The procefs sued out with a view to avoid the statute of limitations must be carried to the sheriff's office, in order to be returned with a *non est inventus*; after which it must be entered on a roll, as of the term in which the writ is returnable, thus:

As yet of the Term of the Holy Trinity, witness Lloyd Lord Kenyon.

Middlesex, to wit. The sheriff is commanded to take C. D. and E. F. if they may be found in his bailiwick, and keep them safely, so that he may have their bodies before our lord the king, at Westminster, on Wednesday next after three weeks from the day of the Holy Trinity, to answer A. B. in a plea of trespass, and to have then there this precept, by bill, Mansfield and Way. At which day, before our lord the king, at Westminster, came as well the aforesaid A. B. in his proper person, and offered himself against the said C. D. and E. F. in the plea aforesaid; and the sheriffs, namely and esquires, sheriffs of the county of Middlesex aforesaid, returned, that the aforesaid C. D. and E. F. are not, nor is either of them, found in his bailiwick.

Roll.

This entry of a bill of Middlesex will serve to illustrate the practice upon other procefs; for, if the procefs sued forth be a *latitat* or *attachment of privilege* in B. R. it must be set forth upon the roll, with the return in the same form; and such procefs, when returned, must be taken to the signer of the writs in B. R. to file the same; and the roll carried to the clerk of the judgments, to be entered and docketed; the plaintiff's attorney making out a docket-paper in this manner:

The entry of Thomas Smith, gentleman, one, &c.

Middlesex, to wit. Entry of a bill to save the statute between A. B. plaintiff, and C. D. and E. F. defendants.

Returnable, &c.

Roll.

If in B. R. the procefs sued forth is an original or *capias*, the entry thereof, with the return, must be made out accordingly and docketed; such procefs, when returned, being filed with the *filazer*.

So, in C. B. if it be an original or *capias*, the same must be filed with the *flazer*, and the roll carried in and docketed with the clerk of the judgments.

The continuances in such case, where the plaintiff is driven to shew the writ continued, may be entered upon the roll at any time.

SECTION VI.

Of the Discharge of Debtors in Execution under the Lords' Act.

Debtors in execution not exceeding 300*l*.

may petition;

when;

For the ease and relief of prisoners who shall be charged in execution for any sum or sums of money, not exceeding in the whole the sum of three hundred pounds *, and who shall be willing to satisfy their respective creditors so far as they are able; it is enacted, That if any person or persons shall be charged in execution for any sum or sums of money †, not exceeding in the whole the above sum, or on which execution or executions there shall at any time remain due, as shall be made appear by oath, a sum or sums of money, not amounting to above the said sum, and shall be minded to deliver up to his, her, or their creditor or creditors, who shall so charge him, her, or them in execution, all his, her, or their estate and effects, for or towards the satisfaction of the debt or debts wherewith he, she, or they shall stand so charged; it shall and may be lawful to and for any such prisoner, *before the end of the first term which shall be next after any such prisoner shall be charged in execution* † by

* By the 32 Geo. 2. c. 28. the sum was 100*l*.; by 26 Geo. 3. c. 44. it was increased to 200*l*.; and now, by the 33 Geo. 3. c. 5. it is extended to 300*l*.

† The acts do not extend to persons in execution on *qui tam* actions. Burr. 1322. Blac. 372.

† Charged in execution means, when a person is actually delivered over to the marshal, and is detained within the walls of the prison; so that if a defendant is arrested on a *ca. sa.* and escape, and be afterwards retaken and committed to prison in the next term, he may apply in the following term to be discharged under the lords' act. 4 D. & E. 367.

his

his creditor or creditors, to exhibit a petition to any court of law from whence the process issued, upon which any such prisoner was or were taken and charged in execution as aforesaid, or to the court into which any such prisoner shall be removed by *habeas corpus*, or shall be charged in custody, and shall remain in the prison thereof, certifying the cause or causes of his, her, or their imprisonment; and not only setting forth, in every such petition, a just and true account of all the real or personal estate which he, she, or they so petitioning, or any person or persons in trust for him, her, or them, is, was, or were entitled to at the time of his, her, or their so petitioning, and of all incumbrances and charges (if any there be) affecting any such real or personal estate of the person or persons so petitioning; but also, a just and true account of all the real and personal estate which any such prisoner or prisoners, or any person or persons in trust for him, her, or them, or for his, her, or their use, was or were interested in or entitled to at the time of his, her, or their first imprisonment in the action in which such person is charged in execution, either in possession, reversion, remainder, or expectancy, to the best of the belief of every such prisoner or prisoners, and so far as his, her, or their respective knowledge extends concerning the same; and likewise, a just and true account of all securities wherein any part of the estates of any such prisoner or prisoners consists; and of all the deeds, evidences, writings, books, bonds, notes, and papers concerning the same, or relating thereto; and the names and places of abode of the witnesses to all securities, bonds, or notes; and where they are to be respectively met with, so far as his, her, or their knowledge extends concerning the same.

what petition must contain.

And before any such petition from any such prisoner or prisoners shall be received by any such court, every such prisoner or prisoners shall give or leave, or cause to be given or left, unto and for all and every the creditor or creditors at whose suit any such prisoner or prisoners shall stand charged in execution as aforesaid, or his, her, or their executors or administrators, and at his, her, or their usual place of abode, or to or for his, her, or their attorney or agent last employed in any such action, suit, cause, or causes, in case any such

Of the notice requisite to be given to the creditors;

when to be
given;

creditor or creditors, his, her, or their executors or administrators cannot be met with, but not otherwise, *fourteen days * at least*, before any such petition shall be presented and received; a *notice in writing*, signed with the proper name or mark of every such prisoner or prisoners; importing therein, that such prisoner or prisoners as aforesaid doth or do intend to petition the court from whence the process issued upon which he, she, or they stand charged in execution, or into the prison to which any such prisoner shall have been removed by *habeas corpus*, or shall stand charged in execution on any judgment recovered on any bill or declaration filed or delivered in any such court; and also setting forth in every such notice or writing a true copy of the account or schedule, including the whole real and personal estate of the person or persons so designing to petition, which he, she, or they doth or do intend to deliver into any such court, other than and except the necessary wearing-apparel and bedding of the prisoner or prisoners, and his, her, or their family, and the tools or instruments of his, her, or their trade or calling, not exceeding ten pounds in value of the whole.

what the notice
must contain.

Affidavit of
service thereof.

And an affidavit of the due service of every such notice shall be delivered with every such petition at the time of presenting thereof, and openly read in the court to which any such petition shall be addressed.

If court satisfied, prisoner ordered to be brought up; how.

And if such court shall thereupon be satisfied of the regularity of every such notice, such petition shall be received; and such court shall thereupon, *by order or rule of the same court †*, cause the prisoner or prisoners so petitioning to be brought up to such court, on some certain day in such order or rule to be specified; and the creditor or several creditors at whose suit any such prisoner or prisoners shall stand charged in execution as aforesaid, his, her, or their executors or administrators, to be summoned to appear personally, or by his, her, or

* It should be complete fourteen days, i. e. excluding only one of the days. Burr. 2525.

† The rule is drawn up by clerk of rules; a copy of which should be served on each creditor and on the gaoler, and an affidavit made of such service.

their

their attorney in such court, at some certain day to be specified in such rule or order for that purpose.

And if any creditor or creditors of any such prisoner or prisoners who shall be so summoned, his or her executors or administrators, shall appear in person, or by his, her, or their attorney; or if any such creditor or creditors, his or her executors or administrators, shall refuse or neglect to appear in person, or by his, her, or their attorney; then upon affidavit of the due service of such rule or order on him, her, or them, or his, her, or their attorney, if any such creditor or creditors, his, her, or their executors or administrators cannot be met with, such court shall, in a summary way, examine into the matter of every such petition, and hear what can or shall be alleged on either side for or against the discharge of any such prisoner or prisoners who shall so petition; and upon such examination, every such court is hereby required to administer or tender to the prisoner or prisoners respectively who shall so petition, and give such previous notice thereof as hereinbefore is directed, an oath, as drawn up in 32 Geo. 2. c. 28.

Of creditors appearing, or not, in consequence of rule and notice.

How court will proceed.

And the court may thereupon order an assignment to be made on the back of the petition of the prisoner's estate and effects, and conveyed to the creditors, &c. (the same to be subject to prior incumbrances); the creditor may thereupon take possession, and sue in like manner as assignees of commission of bankrupts; and no release of the prisoner subsequent to such assignment may be pleaded in bar of any such action: and the court then will make a rule for discharge of the prisoner; and the sheriff or gaoler, being served with a copy thereof will set the prisoner at liberty; nor is the sheriff liable to any action for an escape, if the assignee proceeds to make sale of the estate and effects of the prisoner, and to make a dividend accordingly amongst the other creditors.

Of the assignment of debtor's effects, &c.

How to proceed thereon.

But in case the person or persons at whose suit any such prisoner or prisoners stood charged in execution as aforesaid shall not be satisfied with the truth of any such prisoner's oath, and shall either personally, or by his, her, or their attorney (if he, she, or they cannot personally attend, and proof shall be made thereof to the

How if creditor appears and is not satisfied with prisoner's oath.

Of remanding
prisoner.

the satisfaction of any such court as aforesaid) desire further time to inform him, her, or themselves of the matters contained therein, any such court may remand any such prisoner or prisoners, and direct him, her, or them, and the person or persons dissatisfied as aforesaid with such oath to appear, either in person or by his, her, or their attorney, on *some other day* to be appointed by such said court, *some time at furthest within the first week of the term next following* the time of such examination, but *sooner* * if any such court shall so think fit.

Objecting to
schedule.

And all objections which shall be made as to the insufficiency in point of form against any prisoner's schedule of his estates and effects, shall be only made the first time† any such prisoner shall be brought up.

How, if creditor
dissatisfied when
prisoner brought
up second time.

And if at such second day which shall be appointed, the creditor or creditors dissatisfied with such oath shall **make default** in appearing, either in person or by his, her, or their attorney, or in case he, she, or they shall appear, if he, she, or they shall be unable to discover any estate or effects of the prisoner omitted in the account set forth in such his or her petition; then and in any such case, such court shall, by rule or order thereof, immediately cause the said prisoner or prisoners to be discharged, upon such prisoner or prisoners executing such assignment and conveyance of his or her estates and effects in manner as assignments and conveyances of prisoners' estates and effects are hereinbefore directed to be made.

Of detaining
him by giving a
note for pay-
ment of groats.

Unless such creditor or creditors who shall have charged any such prisoner or prisoners in execution as aforesaid, his, her, or their executors or administrators, doth or do insist upon such prisoner or prisoners being detained in prison, and shall agree by writing signed with his, her, or their name or names, mark or marks, or under the hand of his, her, or their attorney, in case any such creditor or creditors, his, her, or their executors or administrators shall be out of England, to pay

* Court may order him to be brought up again in the same term, for it is discretionary.

† It is a matter of course for court to remand prisoner the first time, if creditor wishes to inquire into the truth of the schedule.

and allow weekly a sum not exceeding two shillings and four pence, as any such court shall think fit, unto the said prisoner, to be paid ever Monday in every week so long as any such prisoner shall continue in prison in execution, at the suit of any such creditor or creditors; and in every such case, every such prisoner and prisoners shall be remanded back to the prison or gaol from whence he, she, or they was or were so brought up, there to continue in execution.

But if any failure * shall at any time be made in the payment of the weekly sum which shall be ordered by any such court to be paid to any such prisoner, such prisoner, upon application in term time to the court where the suit in which any such prisoner shall be charged in execution was commenced or shall have been carried on, or in the prison of which court any such prisoner shall stand committed on any *habeas corpus*, or in vacation time, to any judge of any such court, may, by the order of any such court or judge, be discharged out of custody on every such execution, proof being made before such court or judge, on oath, of the non-payment for any week of the sum of money ordered and agreed to be weekly paid; but every such prisoner and prisoners, before he, she, or they shall be so discharged out of custody by any such rule or order, shall execute an assignment and conveyance of his, her, and their estates and effects in manner hereinbefore directed.

Of prisoner's discharge on failure of payment.

And if any prisoner, who shall petition or apply for his or her discharge under this act, shall refuse to take the said oath hereinbefore directed to be taken, or taking the same shall afterwards be detected before any such court or judge of falsity therein, or shall refuse to execute such assignment and conveyance of his, her, or their estates and effects as aforesaid, as hereinbefore is required to be made by him, her, or them respectively, he, she, or they shall be presently remanded and continue in execution.

* An insolvent debtor has a right to his discharge if his groats be not paid before ten at night of the day on which they are payable; and this right is not waived by the turnkey on the felons side accepting them after that time. *Fisher v. Bull*, 5 D. & E. 35.

Where

How if many
creditors with
his detention.

Where more creditors than one insist on the prisoner's detention, they are to pay him each not exceeding 1s. 6d. per week.

9 & 10 W. 3.
c. 15.

" And whereas many persons are often committed on attachment for not paying money awarded to be paid under submissions to arbitration by rules of court, or under submission to arbitration bonds, and which submissions have been made rules of the court, in pursuance of an act passed in the 9th & 10th years of the reign of king William the Third, for determining differences by arbitration, and likewise for not paying of costs * duly and regularly taxed and allowed by the proper officer after proper demands made for that purpose; and also upon any writ of *excommunicato capiendo*, or other process for or grounded on the non-payment of costs or expences in any cause of proceeding in any ecclesiastical court; it is hereby declared and enacted, That all such persons are and shall be entitled to the benefit of this act, and subject to the same terms and conditions as are herein expressed and declared with respect to prisoners for debt only." 26 Geo. 3. c. 44. sec. 3.

Gaolers to give
notice of this act
to all debtors in
their custody,
&c.

" And it is further enacted, That all gaolers and keepers of prisons are hereby directed and required to give notice of this act to all persons in their custody for debt, within three days after such persons shall have been respectively committed or charged in execution, so as to make the same clearly and perfectly understood; and if any gaoler or keeper of a prison shall neglect to give such notice, according to the true intent and meaning of this act, he shall forfeit and pay to any person who shall sue for the same the sum of fifty pounds, to be recovered by him or her by action of debt, in any of his majesty's courts of record at Westminster, where in no effoign, protection, wager of law, privilege, or imparlance shall be admitted or allowed; and in every such action the proofs shall lie on the person against whom the same shall be brought: Provided nevertheless, that such action shall be brought within six calendar months after the cause of action accrued." Sec. 4.

on penalty of
50 l.

* A defendant in execution for the contempt and for the costs of a *quo warranto* information may be discharged under the lords' act.

" And

"And be it further enacted,* That where any debtors, as aforesaid shall have neglected to take the benefit of the said act within the time limited by the said act, and shall have remained in prison by the space of one year, and shall make it appear to the court out of which such execution issued that such neglect arose from ignorance or mistake†, such debtor shall then be entitled to take the benefit of the said act as if he or she had taken the same within the time by the act so limited as aforesaid." Sec. 5.

Time allowed debtors for taking the benefit of the recited act extended.

"Provided always, That it shall be lawful for any creditor or creditors, at whose suit any debtor shall be so in execution as aforesaid, to file interrogatories for the examination of such prisoner, before his or her being admitted to take the benefit of this or the before recited act." Sec. 6.

Creditors may file interrogatories, &c.

"Provided always, That this act shall not extend to any debt or debts that may be owing to the crown, nor shall it affect any proceeding which at any time may be lawfully had under or by virtue of any commission of bankrupt."

Not to extend to debts due to the crown, &c.

SECTION VII.

Of Summons and Motion.

It is frequently necessary, in the progress of a cause, for the parties to apply, either by their attorney or counsel, to a judge at his chambers, or to the court in which their suit is pending, to obtain certain orders and rules

* A prisoner who has lost the benefit of the lords' act (32 Geo. 2. c. 28.) by the misconduct of an agent, may afterwards be discharged under the 26 Geo. 3. c. 44. s. 5. which provides relief for those who have neglected to take advantage of the former through ignorance or mistake. *Pearce v. Taylor*, 4 D. & L. 231.

† Where a prisoner has been brought into court to be discharged under the lords' act, and upon his examination the court have refused to discharge him, they will not afterwards discharge him on that act, though he make an affidavit of circumstances in answer to the cause shewn on his examination against his discharge, and that those circumstances were not then disclosed owing to a mistake. The 5th sec. 26 Geo. 3. c. 44. is only meant to remedy a neglect in not taking the benefit of the lords' act within the time limited by that act. *Thornton and another v. Dunphy*, 1 H. Blc 101.

agreeable

agreeable to the urgency of their case; the first of which is procured by *summons*, and the last by *motion*.

Of proceeding by Summons.

Summons,
how taken out

A summons may be taken out before any judge of the court wherein the action is brought; for which *1s.* is paid; and the same for every renewal thereof, whether in term or vacation.

Service thereof.

A true copy of the summons must be served on the plaintiff or defendant's attorney; and if there be no attorney, on the parties themselves, or left for them at their last place of abode. As it may afterwards be necessary for the person serving same to swear to such service, he ought to examine it with the original.

Attendance
thereon.

At the hour appointed by the summons, the attorney taking out same ought to attend at judge's chambers, and wait half an hour* for the attorney of the adverse party; if he does not attend by that time, then take out and serve a second summons, marking thereon *second summons*; upon which attend as before, and again renew the same, and serve it, marking the *third summons*, which, if not obeyed, make affidavit before the judge of having taken out and attended upon the third summons, and a judge's clerk will give you an order for the matter applied for. Pay for each order *2s.* and serve same in like manner as the summonses.

How, if disobeyed.

If judge's order be disobeyed; and the party who applied for it would wish to enforce it by attachment, he must previously move to make the judge's order a rule of court; and then move for an attachment, which the court will, in some cases, award in the first instance; but generally a rule *nisi* is granted to shew cause why an attachment should not issue.

Of impeaching
it.

If a judge's order be acquiesced in, it is as valid as any act of the court; but the validity of it may be impeached, either by moving the court to set it aside, or,

* Formerly one hour's attendance was necessary; but now by rule, K. B. Trin. 35 Geo. 3. an attendance on any judge's summons; for half an hour, next immediately following the return thereof, shall be sufficient.

if made in vacation, by applying the next term to set aside the proceedings had under it. Tidd, 270.

Of proceeding by Motion.

A motion is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court which becomes necessary in the progress of a cause, or to get relieved in a summary manner even after the action is at an end, without the necessity of resorting to the more expensive and dilatory proceeding of an *audita querela*. Motion, what.

A motion is usually grounded upon an affidavit, being a statement upon oath of the facts upon which the application to the court is made. Affidavit necessary.

It is sometimes absolute in the first instance, if the thing applied for is a mere matter of course; otherwise, it is only granted *conditionally*, to become absolute on a certain day, unless cause be shewn to the contrary; it is then called a rule *nisi*. Rule absolute. Rule nisi.

A copy of the rule must be served on the opposite party; and, if no cause shewn on the day, it may be made absolute the next day, upon an affidavit of the regular service of the rule *nisi*. Service thereof.

If cause is intended to be shewn against it, a copy of the rule, and also of the affidavits on which it was granted, (and which are always left with the clerk of the rules till made absolute or discharged,) must be had from the office, otherwise the court will not permit any cause to be shewn. Copy of rule and affidavits necessary.

Sometimes cause is shewn upon the weakness of the party's own affidavit who obtained the rule; sometimes upon the facts to be disclosed in answer, and which are stated in an affidavit on the other side. Of shewing cause.

As the counsel's name who obtained the rule *nisi* is always put in the rule, it is the practice for the counsel on the other side to inform him of his intention to shew cause, and to shew him the affidavits with which he is furnished for that purpose.

When

How disposed of.

When cause is shewn, the party to shew cause begins, and the other answers; the court then decides according to the merits.

Affidavits intitled.

The affidavits, on each side should be properly intitled and stamped, and not sworn before a commissioner who is the attorney in the cause; otherwise they will be bad.

Rule nisi.

Stay of proceedings.

A rule *nisi* to set aside proceedings for irregularity, and in the mean time proceedings to be stayed, operates as a suspension to the proceedings till discharged.

Of filing affidavits.

If the affidavit on shewing cause is a positive contradiction, though false, the rule *nisi* will be discharged; the court cannot enter into the merits of the truth or falsehood of the fact; but the only step for the other side to take is to desire the affidavit may be filed, and indict the party making it for perjury.

Of enlarging the rule.

If the application be such that the adverse party cannot be prepared to shew cause against it in time, as where he is obliged to send into the country for instructions, and cannot get his affidavit ready, or the like, he may move the court to *enlarge* the rule till some other day; but the court will be cautious of suffering this, if the other side is to be delayed by it (unless they consent); and if the party is in custody, they will scarce ever permit it.

Sewing cause at chambers.

If a rule is enlarged near the end of the term, it is sometimes ordered for the sake of expedition to shew cause at a judge's chambers.

Costs of motion.

The costs of the motion are in the discretion of the court. In general, if the rule *nisi* is drawn up on payment of costs, if discharged, it is discharged with costs; but that is not always the case; nor, if made absolute, is it always made absolute with costs. The costs are often directed to abide the event; *i. e.* to be paid by the party who is ultimately unsuccessful in the cause.

Peremptory rule, what.

Sometimes a rule becomes *peremptory*; that is, when it is enlarged till the next term.

By

By Reg. Mich. 17 Geo. 3. it is ordered; That all rules enlarged till the next term be *peremptory*; and that eight be set down for every day. They are, then called on in order, when cause must *peremptorily* be shewn, or they will be made absolute.

If a rule be drawn up otherwise than as intended, it cannot be altered without a fresh application to the court, who will order the mistake to be rectified; so they will open any rule, and suffer cause to be shewn, if made absolute too soon, or by surprise, upon the opposite party, or the like.

When court will open rule.

For the better conducting of the business of the courts, certain days are appropriated to certain purposes. Thus, Tuesdays and Fridays are called paper days; and particularly set apart for arguing all causes set down in the paper, by the clerk of the papers.

Days appointed for the business.

By Reg. Mich. Term, 30 Geo. 2. all special causes, to be set down by the clerk of the papers of this court to be argued, shall be entered at least four days exclusive of the day of argument; of which notice shall forthwith be given to the attorney, or agent, on the other side; and that all such causes shall be argued in the order and course the same stand entered; and shall not be adjourned to any future day, by consent or otherwise, unless the court shall, for reasonable cause verified by affidavit, upon application to be made by either of the said parties, their attorney, or agent, at least two days before the day of argument, otherwise order; and, all such causes remaining undetermined, at the end of any term shall, without any new entry, be continued in the books kept by the clerk of the papers, to come on the next term in the order and course the same stand.

Of special causes, how set down;

or adjourned.

Wednesdays and Saturdays are appropriated to special cases and other business on the *crown* side; Mondays and Thursdays are open days for motions, or any business that may be appointed by the court to come on; and on the other days, after the civil paper or crown business is gone through, motions are heard.

Crown paper-days.

New Practice of
King's Bench
in hearing mo-
tions intro-
duced by Lord
Mansfield.

To that liberality of sentiment which so eminently adorned the late accomplished and venerable Chief Justice of the King's Bench, the Earl of Mansfield, is the junior part of the bar indebted for the valuable privilege which they at present enjoy, of being enabled to bring the business of their clients before the court with equal expedition with their *seniors* in the profession.

Before Lord Mansfield's time, the *settled* and general rule of the court was, to begin *every day* with the senior counsel within the bar, and then to call to the *next senior* in order, and so on, as long as it was convenient to the court to sit; and to proceed again in the same manner upon the *next and every subsequent* day, although the bar had not been half or perhaps a quarter gone through upon any one of the former days; so that the juniors were very often obliged to attend in vain, without *being able* to bring on their motions for many successive days. But that learned and ever to be respected judge was no sooner seated on the bench, than he established a different and more equitable method; for he professed, and most punctually practised, the going quite through the bar, before he would begin again with the seniors, even though it should happen to take up two or three more days, before all the motions which were ready at the bar, on the first day, could be heard. Burr. 58.

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CHAPTER XX.

Of Error.

SEC. 1. *The Nature of the Writ of Error, and in what Cases it lies.*

SEC. 2. *Of proceeding in Error from the Common Pleas into the King's Bench.*

SEC. 3. *Of proceeding in Error from inferior Courts into the King's Bench.*

SEC. 4. *Of proceeding in Error from the King's Bench into the Exchequer Chamber.*

SEC. 5. *Of proceeding in Error in Parliament.*

SEC. 6. *Of proceeding in Error coram nobis, &c.*

SEC. 7. *Of proceeding in Error tam quam.*

SEC. 8. *Of proceeding in Error by Plaintiff to reverse his own Judgment.*

SEC. 9. *Of Summons and Severance in Error, of quashing Writs of Error, of the Abatement of Writs of Error, of amending Judgments after Error brought, and amending Writs of Error.*

SEC. 10. *Of False Judgment.*

SECTION I.

Of the Nature of the Writ of Error, and in what Cases, and into what Courts it lies.

WHENEVER the final judgment of the court is obtained, if either party be dissatisfied with it, the record may be removed by writ of error into a superior tribunal, in order to the reversal or affirmance of the former judgment.

Writ of error, what.

When it lies.

A writ of error lies for some mistake, or supposed mistakes, in the proceedings of a court of record; for to amend errors or mistakes in a base court, not of record, a writ of false judgment lies, of which hereafter, Section 10.

A writ of error is a writ of right in all cases but felony and treason, Salk. 504. and may be had against the king.

When in same court.

Error lies either in the same court where the judgment was, or in a superior court.—It lies in the same court where the judgment was given, when the error was not for any fault in the court, but for some defect in the process of the cause, other than in the judgment, or for default of a continuance, Dy. 196. a. or for default in adjudging execution, 1 Rol. 176. 7 Hen. 6, 30 Yelv. 157. F.N.B. 21. i.; as for misprision of the clerk, or for error in fact; and there the writ may be in the same court, 1 Sid. 203. except where such error is in the Exchequer. 3 Lev. 38. But if there is error in law, or in the judgment of the court, then the writ lies to a superior court, and such writ of error only lies upon matter of law arising upon the face of the proceedings, so that no evidence is required to substantiate or support it; for if there has been an error in the determination of the facts in the cause, which it was the province of the jury to determine, the method of obtaining redress, in such case, is not by writ of error, but by an attaind of the jury, or appealing to the justice of the court to grant a new trial, in order to correct the mistakes of the former verdict.

When it lies into K. B.

A writ of error lies from almost all inferior courts of record in England into the King's Bench. But error does not lie from any inferior court of record in England into the Common Pleas, except in two or three cases; for which vide Com. Dig. Bac. Abr. &c. But the better opinion seems to be, that error lies not into C. B. in any case. In courts newly constituted, and which are empowered to proceed in a method different from the courts of common law, their judgment is not subject to a writ of error; but yet the King's Bench may examine them by certiorari or mandamus.

Q. Whether into C. B.

Till the late repeal of the *declaratory act*, 6 Geo. 1. c. 5. the House of Lords in Ireland had no jurisdiction of error from any court there; and error in a judgment in the King's Bench in Ireland lay immediately in the King's Bench here. But now the House of Lords in Ireland will be the *dernier resort* there, as it is in England.

No writ of error now from Ireland.

Errors in judgments, *real* and *mixt*, before the justices in their great sessions in Wales, lie in the King's Bench, by the 34 & 35 of Hen. 8. c. 26.

From courts in Wales.

And errors in judgments, in pleas *personal* there, lie also in the King's Bench, since the stat. 1 W. & M. c. 27.

If error is in the county palatine of Lancaster, the writ is directed to the chancellor or his deputy, commanding, that he give it in charge to the justices at Lancaster, that they send to him in his chancery the record, &c. and the writ which came to him thereupon, and that he transmit the record.

From county palatine.

But if an erroneous judgment be given in Durham, in the chancery, upon proceedings according to the common law, or before the justices of the bishop, a writ of error lies before the bishop himself; and if he gives an erroneous judgment, error lies in the King's Bench, 2 Crom. 330.

But error on a judgment in the Cinque Ports lies neither in the King's Bench nor Common Pleas; but by custom such judgment is examinable by *bill*, in nature of a writ of error, *coram domino custode, seu guardiano quinque portium apud curiam suam de Shepway*.

From Cinque Ports.

Nor does *error* lie in the King's Bench or Common Pleas on a judgment in the *stannaries*, but an appeal to the guardian, and from him to the prince; and if no prince to the king's council. 2 Crom. 330.

From court of stannaries.

Where plaintiff has suffered a nonsuit, he cannot bring on that judgment; for though the record be ever so erroneous, he cannot after his default by suffering a nonsuit have judgment in his favour. *Kempland v. Macaulay*.

No writ of error on nonsuit.

Macaulay, K. B. 4 D. & E. 436. Box v. Bennet, C. B. 1 H. Blac. 432. But Semb. contra. Str. 235.

Who must be parties in error.

It is a certain rule, that all the parties to the suit below must, in all cases of *error*, be made parties also in the writ of error; and in case of the death of a party he must be named, and his death alleged in the writ. And if one refuses, he should be summoned and seivered. Carth. 7. Stra. 606, *Cooper v. Ginger*. See *post*, Section 9.

SECTION II.

Of proceeding in Error from the Court of Common Pleas into the King's Bench.

A. Of suing out Writ and of Bail thereon, when requisite, &c.

B. Of transmitting the Record, and herein of the *Scire Facias quare Executionem non*.

C. Of non-prossing the Writ.

D. Of alleging Diminution.

E. Of assigning Errors, Joinder in Error, and of the Error Book, and of the *Scire Facias ad audiendum Errores*.

F. Of the Judgment and Execution.

3. A. Of suing out Writ and of the Bail thereon.

If an erroneous judgment is given in the Common Pleas, the writ of error in all cases is made returnable into the court of King's Bench.

How to procure writ.

In order to bring error, the attorney for the party suing it finds the number of the judgment roll from the docket of the prothonotary's office, and thereby finds the roll in the treasury, of which he makes a copy, and thereupon the cursitor makes out the writ of error. Which may be sued out before judgment, but judgment

ment must be given before the return of it. 3 Keb. 308.
Vent. 96. Latch. 133.

For should it be made returnable before judgment given, it is such a fault as is not amendable. Str. 807.
Jacques v. Nixon, 1 D. & E. 279. Return thereof.

When the writ of error is obtained from the *curfitor*, you must get it sealed, and then carry it to the clerk of the errors, and pay him his fee for the allowance of it, who will give you a notice in writing of such allowance; after which you should serve the other party's attorney with a copy of the writ and allowance thereof, which should be served immediately; for until it is served, it is no *superfedeas* to the execution; nor is it a *superfedeas*, unless bail be put in by the party suing the writ of error, provided it be a case that requires bail. Allowance.
How for a *superfedeas*.

Of the operation of the allowance, and how a writ of error operates as a *superfedeas*, see vol. I. ch. 12. §.

In order to prevent vexatious delay by frivolous writs of error, and to protect the party who has obtained a judgment, special bail is in many cases, by particular statutes, required to be given by the plaintiff in error; and perhaps it would be better if the legislature had made it requisite in all cases. Of bail in error,
required by different statutes.

The first statute requiring bail on error is the 31 Eliz. c. 3. sec. 3. which enacts, "That before any allowance of any writ of error, or reversing of any *outlawry* be had by plea or otherwise, through or by want of any proclamation to be had or made according to the form of this statute, the defendant in the original action shall put in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff, for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said *outlawry*." 31 Eliz. c. 3.
bail in error after
outlawry.

The next statute, requiring bail on error is the 3 Jac. 1. c. 8. intituled, "An act to avoid unnecessary delays of execution;" 3 Jac. 1. c. 8.
bail in error in
debt on bond,
or for rent.

"execution;"—whereby it is enacted, "That no execution shall be stayed or delayed upon or by any writ of error, or *superfedeas* thereupon to be sued for the reversing of any judgment given in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only; or upon any action or bill of debt for rent, or upon any contract sued in any of his highness's courts of record at Westminster, or in the counties palatine of Chester, Lancaster, and Durham; or in the courts of great sessions in any of the twelve shires of Wales, unless such person or persons, in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made or *superfedeas* to be awarded, be bound unto the party for whom any such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay (if the said judgment be affirmed) all and singular the debts, damages, and costs, adjudged upon the former judgment; and all costs and damages to be also awarded upon the delaying of execution."

Nature of recognizance.

Explanation of the statute.

The only cases provided for by this statute were, actions of *debt* upon any single bond for debt, or obligation with condition for payment of money only, or action of *debt* for rent, or upon any contract.

To what cases it extends.

Bail therefore is not requisite upon bringing a writ of error upon a judgment in an action of debt founded upon a prior judgment, *Biddleston v. Whytell*, Burr. 1548. because this is *casus omissus* out of this act, which is to be taken literally, and not extended by construction, *Ibid.* and 1 Blackf. Rep. 506, *Biddleston v. Whytell*.

Of bonds for performance of covenants;

No bail is necessary in bringing a writ of error upon a judgment in debt or bond conditioned for performance of covenants, or upon a bail-bond, because these bonds are not conditioned for the payment of money only.

or in part only for payment of money;

The condition of a bond was to perform covenants in an indenture; and among the rest was one for payment of

of money, and the others were collateral; and the breach assigned was for the non-payment of the money: yet, on error brought upon the judgment no bail was taken; for *per Holt*, this is not a condition for the payment of money only, but to do collateral acts. It is true, the breach assigned is for not paying the money; and therefore the case upon the pleadings is the same as if the condition had been for the payment of money only, yet the condition is not for the payment of money only. Carth. 28.

The condition of a bond was to pay for so much beer as should be delivered to S. not exceeding 100*l*. After judgment upon demurrer below, error was brought. *Et per Cur.* no bail requisite. This sum was not certain even at the time of the action brought. *Thrale v. Vaughan*, Stra. 1190. 1 Willf. 19. S. C.

or to pay for goods to a certain amount.

Action upon an *infimul computasset* in C. B. error brought in B. R. after judgment for the plaintiff; and upon the question of bail being requisite, *per Cur.* This case is out of the statute, for the debt recovered did not accrue by any contract or other duty certain at first, but merely upon an account between the parties, which account has reduced divers uncertain sums to one certainty: therefore, as the action was founded upon the account, which is uncertain, this case is out of the statute.—The same law in debt, upon an award, when the arbitrators have reduced divers controversies to be recompensed by one sum: though this is a debt, yet it is not such a one as is intended by the statute, which must be a debt certain at first. Yelv. 227. 2 Bulst. 53.

Of an infimul computasset.

The original action was in debt on bond conditioned to pay so much money as J. S. should declare to be due on an account; and, after pleadings below, error was brought on the judgment. And by all the judges, except Keeling, the plaintiff in error must put in bail, or execution may go; for this obligation is made for the payment of money only, which, though not certain when the obligation was made, is yet certain before the action brought. 1 Lev. 117. 1 Keb. 613. 690, *The Dean of St. Paul's v. Capell*.

Of bond to pay money to be awarded.

But

Of bottomree
bonds.

But if the defendant brings error after judgment against him in an action upon a *bottomree bond*, he must put in bail; because the contingency having happened, this is now, in every respect, a bond for the payment of money. Stra. 476, *Pitt v. Coney*.

To pay money
according to in-
denture.

Motion for leave to take out execution, no bail being put in on a writ of error brought by defendant, the action being in debt on bond, conditioned only for payment of money according to the true intent and meaning of an indenture, and not performance of covenants. On shewing cause, the court held that bail was required by 3 Jac. 1. If the bond had been generally for performance of covenants in an indenture, and the only covenant in that indenture had been for payment of money, bail must have been given on error. But the court gave time to put in bail. Barnes, 98, *Littleton*, executor, v. *Hanson*.

The condition of a bond was for payment of 500*l.* at such a day, being the sum mentioned in certain indentures of such a date. And error being brought, the plaintiff in error would have been excused from giving bail, because the words of 3 Jac. 1. are, "*bonds for payment of money only*;" whereas, this was rather a bond for performance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500*l.* and the other words were only added to shew they were not distinct debts, but only different securities for the same. *Dobson v. Horsey*, Stra. 959.

Bonds given as
collateral se-
curity.

A bond given by a third person, to a third person, as collateral security for a debtor's paying his creditors 15*s.* in the pound upon a liquidated total of his debts, is a bond with condition for the payment of money only within this act; therefore bail requisite. Burr. Rep. 4 pt. 746.—And its being payable by instalments makes no difference.

If bond be not
within statute,
but judgment by
default, bail is
requisite.

But if an action of debt be brought on a bond conditioned for the performance of covenants, and the defendant lets judgment go by default without cravingoyer of the condition, and after brings error, he must put

put in bail; because it does not appear to the court upon the record, that the condition was for performance of covenants. This is the practice in B. R.

But in C. B. it is otherwise, as appears by the following case. Plaintiff declared in debt on a bond, of which defendant craved *oyer*; and the condition appeared to be for performance of *covenants*. Defendant after *oyer*, instead of pleading, entered *nil dicit*; in order that *oyer* of the condition appearing upon record he might bring a writ of error without bail. The court, on hearing counsel, set aside this entry, and gave plaintiff leave to enter judgment by *default*. And the question then was, whether the condition of the bond not appearing on record, bail ought to be required on the writ of error or not? And the court held, that the matter of bail is properly examinable by affidavit; and the bond being conditioned for performance of covenants, bail ought not to be required. *Spinks v. Bird*, Barnes, 72.

Motion for bail upon error in an action of debt on bond, conditioned for payment of 300*l.* mentioned in a surrender of a copyhold by way of mortgage, and not for performance of covenants, wherein judgment had passed by default. *Per Cur.* there must be bail. This case is out of the stat. 16 & 17 Car. 2. but within the stat. 3. Jac. 1. Barnes, 78, *Woods v. Armstrong*.

It is to be observed, that the above statute of James extends to all such actions as are mentioned therein, whether judgment be after verdict or by default; but the two following statutes only extend to judgment after verdict; so that no bail is required on error to reverse a judgment by default, except it comes within the statute of James.

Statute of James extends to judgment by default.

The third statute requiring bail is the 13 Car. 2. c. 2. (which after reciting the statute of 3 Jac. 1. in sec. 8.), sec. 9. enacts, "That no execution shall be stayed in any of the courts aforesaid, by any writ or writs of error, or *superfedeas* thereupon, after any verdict and judgment thereupon obtained in any action of debt grounded upon the statute made in the second year of the reign of the late king Edward the Sixth, for not setting

13 Car. 2. In what cases bail required thereby,

after verdict.

" setting forth of tithes ; nor in any action upon the case
 " upon any promise for payment of money, actions *sur trover*,
 " actions of covenant. detinue, and trespass, unless such
 " recognizance, and in such manner, as by the said re-
 " cited former act is directed, shall be first acknow-
 " ledged in the said court where such judgment is
 " given."

Double costs
 given.

Sec. 10. " Gives double costs to a defendant by de-
 " lay of execution by reason of error brought, if the
 " judgment be affirmed."

16 & 17 Car. 2.

Sec. 11. " Provides that the said statute shall not ex-
 " tend to actions popular ; or upon penal statutes, in-
 " dictments, &c. other than the statute of Edward the
 " Sixth mentioned."

In what cases
 bail required
 thereby,

after verdict.

Dower.

Ejectment.

The fourth statute requiring bail on error, is the
 16 & 17 Car. 2. c. 8. sec. 3. which enacts, " That no
 " execution shall be stayed in any of the aforesaid
 " courts *, by writ of error or *superfedeas* thereon, after
 " verdict and judgment thereupon, in any action per-
 " sonal whatsoever, unless a recognizance, with con-
 " dition according to the statute made in the third
 " year of king James the First, shall be first acknow-
 " ledged in the court where such judgment shall be
 " given : " and further, " That in writs of error to be
 " brought upon any judgment after verdict in any writ
 " of dower, or in any action of *ejectione firme*, no ex-
 " cution shall be thereupon or thereby stayed, unless
 " the plaintiff or plaintiffs in such writ of error shall be
 " bound unto the plaintiff in such writ of dower, or
 " action of *ejectione firme*, in such reasonable sum as
 " the court to which such writ of error shall be di-
 " rected shall think fit ; with condition, that if the judg-
 " ment shall be affirmed in the said writ of error, or that
 " the said writ of error be discontinued on the default
 " of the plaintiff or plaintiffs therein, or that the said
 " plaintiff or plaintiffs be nonsuit in such writ of error,
 " that then the said plaintiff or plaintiffs shall pay such
 " costs, damages, and sum and sums of money as shall
 " be awarded upon or after such judgment affirmed,
 " discontinuance or nonsuit had."

* The same courts as are mentioned in the statute of James 1. viz.
 the courts at Westminster, courts of the counties palatine, and great session.

And

And by sec. 4. "To the end that the same sum and
 "sums and damages may be ascertained, it is enacted,
 "That the court wherein such execution ought to be
 "granted, upon such affirmation, discontinuance, or
 "nonfuit, shall issue a writ to inquire as well of the
 "mesne profits, as of the damages by any waste com-
 "mitted after the first judgment in *dower*, or in *ejec-*
 "*tione firmæ*; and upon the return thereof, judgment
 "shall be given, and execution awarded for such mesne
 "profits and damages, and also for costs of suit."

Provided, "That this statute shall not extend to any
 "writ of error to be brought by any executor or admi-
 "nistrator, nor any action popular or upon a penal
 "statute (except the statute of Edward the Sixth), nor
 "upon indictments," &c.

Exceptions in
 the statute.

On error in *ejectment*, the plaintiff in error being in
 a remote part of the kingdom, found two sufficient men
 to be his bail, who were bound in a recognizance, &c.
 The court, holding that the intent of this statute of
 Charles the Second being to secure the defendant in
 error, it was here fully observed, because this bail was
 better than the plaintiff's own recognizance. *Barnes v.*
Bulver, Carth. 121. *Goodtitle v. Bennington*, Barnes, 75.

Plaintiff need
 not enter into
 recognizance,
 two sureties
 sufficient.

Bail was put in by plaintiff in error in *ejectment*,
 but he himself was not bound as required by the sta-
 tute 16 & 17 Car. 2. on which plaintiff below moved
 for leave to take out execution, and obtained a rule to
 shew cause. For plaintiff in error it was urged, that
 it is become the constant practice to give bail by sure-
 ties, and more for the advantage of defendant in error.
Per Cur. before the statute 16 & 17 Car. 2. no bail was
 required in *dower*, *ejectment*, &c. By the stat. 2 Jac. 1.
 bail was required in debt only. The stat. of Car. 2.
 extends to all personal actions after verdict, and re-
 quires sureties. In *dower*, real or mixt actions (and
ejectment is a mixed action) after verdict it requires the
 party to be bound. This is a less security than by bail
 who justify, for the party is bound by the judgment.
 Bail in error cannot be put in before a commissioner in
 the country. The method of the statute cannot be
 followed without great inconvenience; and a better
 method,

method, where the party lives at a distance from London, is substituted, and has been the practice ever since; Rule discharged. *Lushington and Doe on dem. of Godfrey*. Barnes, 78.

To what amount bail to be given.

A recognizance on error in *ejectment*, ought to be in the value of two years *mesne profits*; and double costs is usually taken in both courts, Barnes, 103.; or in double the rent due if *ejectment* for rent. Burr. 2501.

If no bail given.

Error on verdict in *ejectment* allowed, but plaintiff in error entered into no recognizance, nor put in bail, as plaintiff below had not got the costs taxed, without which the measure or *quantum* of the recognizance could not be fixed. Plaintiff below, for want of the recognizance and bail, in *four days*, took out an *habere facias possessionem*, and had possession given him, which the court held to be regular. *Et per Cur.* Defendant should have applied to stay execution, and then the court would have obliged plaintiff to have got his costs taxed. The writ of error is no *superfedeas* without bail. A judge would have taken bail, if applied to. Rule discharged. Barnes, 212, *Betts on dem. of Robson v. Egerton*.

In what cases executors to give bail in error.

If judgment be against an *executor or administrator de bonis propriis*, and he brings a writ of error, he must put in bail in such cases as are required by the statutes before mentioned, and pay costs if judgment be affirmed; but if judgment be *de bonis testatoris* only, he shall neither put in bail nor pay costs. *Vide* the proviso in 16 & 17 Car. 2.

Though an executor is not obliged to give bail on error, yet the court may take it; and if he does give bail, it is binding. *Str.* 745, *Lasere v. Johnson*. *Idem v. Emily*.

A *scire facias* against the defendant, as *administrator on a devastavit* alleged, and judgment was *de bonis propriis*; on which he brought error; and by the whole court, he shall find bail, for here he is charged in his proper goods, and it is not as where an *administrator* is charged in the testator's goods 1 Lev. 245. 1 Sid. 368. 2 Keb. 295. 371.

After

After an award of execution against *bail* on a recognizance in error, they brought a writ of error as to such award of execution. Plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to shew cause, which was discharged; no bail in this case being requisite. Barnes, 194.

When bail required upon error brought by bail;

But in error on a judgment *after verdict* upon a *sci. fa.* against bail, there must be bail to the writ of error. 2 Blackf. Rep. 1227. And in this case held, that a *sci. fa.* is a personal action, and consequently within the statute 16 & 17 Car. 2. which requires bail on error of a judgment *after verdict* in any action personal.

Bail is not requisite, as it should seem upon bringing a writ of error returnable in parliament upon a judgment in B. R. in action of debt brought upon a recognizance in error. Burr. 1567-8. But. Q.

or upon a recognizance in error.

But upon error in parliament of a judgment affirmed in B. R. new bail is required. Salk. 97.

Formerly, upon error brought of a judgment in an inferior court of record, no bail was necessary, as not within either of the foregoing statutes: but now, by 19 Geo. 3. c. 70. it is enacted, "That no execution shall be stayed upon or by any writ of error or *superfedeas* thereon to be sued for the reversing of any judgment given in any inferior court of record, where the damages are under ten pounds, unless such person, in whose name the writ of error shall be brought, with two sufficient securities, such as the court (wherein such judgment is given) shall allow of, shall first, before such stay made, or *superfedeas* awarded, be bound unto the party for whom any such judgment is given, by recognizance to be acknowledged in the same court, in double the sum adjudged by the former judgment, to prosecute the said writ of error with effect; and also to satisfy and pay (if the said judgment be affirmed, or writ of error be non-prossed) all and singular the debts, damages, and costs adjudged; and all the costs and damages awarded for the delaying of execution."

Of bail on error from inferior courts.

If

When new bail
required;

If a writ of error in B. R. on a judgment in C. B. is amended in B. R. new bail must be given to the amended writ in C. B. and the plaintiff below shall not take out execution for want of bail. *Rafael v. Verelst*, East. 16 Geo. 3. C. B. 2 Blackf. Rep. 1067. S. C.

So new bail must be put in on every new writ of error. *Ld. Ray.* 840.

As if on judgment in C. B. error is brought in K. B. and on affirmance of the judgment error is brought in parliament, the party must give a new recognizance, for the first does not include the costs to be assessed in the House of Lords. *Sal.* 97.

when to be put
in;

The plaintiff in error must put in bail within four days after the service of the allowance of the writ of error, provided such service of the allowance is not until after final judgment has been signed; but if such service of allowance be before final judgment signed, plaintiff in error has then four days from the signing of final judgment be it when it may. *Jaques v. Nixon*, 1 D. & E. 280.

How days
reckoned.

And they are four *clear* days, so that if judgment be signed on a Monday, execution cannot issue for want of bail until the Saturday following. *Bennet v. Nichols*, 4 D. & E. 121.

How to be put
in.

The names of the bail, with their additions, are to be taken to the clerk of the errors, and entered in his book; he will meet you at any time appointed at the judge's house or chambers for this purpose, bring the bail, and he will take the recognizance.

Of the notice
of bail;

When *bail in error* is put in, notice thereof ought to be given to the defendant or his attorney; and if the defendant does not except to those bail *within twenty days* after such notice, they shall be allowed. *Reg. Mich.* 5 W. & M.

In error.

E. F. v. C. D.

Form thereof.

Take notice, that special bail was this day put in upon the writ of error, brought in this cause with the clerk of the errors, before

the

the Hon. Mr. Justice Buller, at his chambers in Serjeants Inn, Chancery-lane, London; and their names are A. B. of, &c. and F. G. of, &c. Dated, &c. Your's, &c. T. S. attorney for plaintiff in error.
To L. M. attorney for the defendant.

If the defendant in error thinks the bail insufficient, he may at any time, within the twenty days, have a rule from the clerk of the errors for better bail; and after service of such rule, if those bail do not justify in four days, or better bail not put in within that time, the defendant in error may sue out execution of his judgment below: but the writ of error still remains, and may be proceeded in, the *superfedeas* to the execution only being taken away. *Ld. Raym. 840.*

Of excepting to bail.

If a rule for better bail is served in vacation, the plaintiff in error need not in K. B. perfect his bail till the next term; but in C. B. he ought to justify before a judge, and execution sued out for want of it was held regular. *Barnes, 211.*

Of the rule for better bail.

The same notice of justification in error is good as in common cases, *i. e.* if the same bail, one day; if different or added bail, two days; and clerk of errors will attend the court with his book; and rule for allowance of the bail must be drawn up at clerk of rules, and served. See vol. I. c. 4. sec. 5.

Notice of justification.

How to justify.

In error upon a judgment in debt on a bond in the penalty of 1470*l.* it was moved to justify bail, each in 1470*l.*; on the other side it was insisted, that the bail ought each of them to justify in double the sum the judgment was given for; but *per curiam*, the sum recovered is double the debt really due, and it is sufficient for the bail to justify each in the sum of 1470*l.* *Moor & Lynch in error, Willf. 1 & 2. 213.*

To what amount to justify.

Bail in error, who refuses to justify, may have his name struck out of the bail-piece at any time. *Jones v. Tubb, in error in B. R. 1 Willf. 337.*

If bail be not put in or do not justify, &c. in due time, execution may go; nor is there any occasion for any certificate from the clerk of the errors that no bail is put in. *Inledon v. Clark, Bar. 212.*

How if not justified in time.

Nature of recognizance in C. B.

The recognizance of bail in error in C. B. has not the condition incorporated with it, as with a recognizance of bail on a *capias ad respondendum* but is subscribed by way of defeasance to it. Therefore a *scire facias*, setting out the recognizance, without the condition, was held good, on an issue of *nul tiel record* pleaded to it. *Malland v. Jenkins*, Barnes, 93.

Bail cannot render;

Bail in a writ of error cannot surrender their principal in discharge of themselves; for the condition of the recognizance is, that the *plaintiff* in error shall prosecute his writ with effect; and, if judgment be affirmed, shall satisfy and pay the debt, damages, and costs recovered, together with such costs as shall be awarded by occasion of the delay of execution; or else that they, the bail, shall do it for him.

nor be relieved if plaintiff a bankrupt.

So that if plaintiff in error becomes a bankrupt pending writ of error, bail cannot be relieved. *Southcote v. Brathwaite*, 1 D. & E. 624.

No rule to transcribe till justification.

If defendant in error excepts to the bail, and they give notice of justification, he must not give a rule to transcribe before they have justified.

¶

¶ Of transmitting the Record, and herein of the *Scire Facias quare Executionem non*, and of *nonprossing* the Writ of Error.

Of the rule to transcribe.

When bail are put in and justified, provided it be a case that requires bail, if not, upon the return of the writ; the defendant in error, if the record is not brought in, may take out and serve the plaintiff with a rule to transcribe, which must be served on plaintiff's attorney, or upon the plaintiff himself; service of rules to transcribe being an exception out of the general rule. *Green v Upton*, Bar. 410.

How transcript obtained.

The plaintiff in error then leaves a copy of the proceedings and judgment with the clerk of the errors (having first docketed and carried in the roll), for him to make up the transcript within the time specified in the rule.

It is an eight-day rule, within which time the record must be certified.

Within what time.

But though eight days are mentioned, which the officer is not to exceed, yet it is his duty to transcribe sooner if he can; and as soon as the record is brought into court, defendant in error may proceed upon it. *Sambridge v. Housley*, 2 D. & E. 17.

May do it before.

If the rule expires in vacation, and the record is brought in, it is as a record of the preceding term.

How if rule expires in vacation.

The transcript must be paid for by plaintiff in error; and if not paid for in due time, execution may issue, a certificate having been first obtained in writing from the clerk of the errors, that plaintiff has made default in transcribing. R. M. 28 Car. 2.

Of paying for transcript.

Though the record should not be transcribed, bail are liable, because they are bound to prosecute the writ of error with effect. *Roe v. Whitehead*, Bar. 499.

Bail liable though no transcript.

When the transcript is complete, it is delivered over by clerk of the errors, with the writ of error, to the signer of the writs (Mr. Webb) in the King's Bench office, the parties take copies thereof, and the cause is then said to be in the Court of King's Bench. [For form of transcript, see *Appendix*, W.] The next step for defendant to take to accelerate plaintiff is to sue out a *scire facias quare executionem non*, which is a writ calling upon him to shew cause why execution should not be adjudged to the plaintiff. [For form thereof, see *Appendix*, W.]

Transcript to whom delivered.

Cause then in B. R.

[*Appendix*, W.]

Of the *scire facias* quare.

[*Appendix*, W.]

If the record is brought in in vacation, the *scire facias* may be tested the last day of the preceding term, and made returnable the first day of the next. 2 D. & E. 17.

Its teste.

If not brought in till the first day of term, or within the term, it may be tested on the first day of the term.

There must be fifteen days between the teste and return of the *scire facias*.

Its return.

It must be returnable on a general return day, if proceedings by original; if by bill, as against an attorney, then on a day certain. 2 Ld. Ray. 1417.

Scire feci, or two nibils.

To the *scire facias*, there must be either a *scire feci* or two *nibils*; if a *nihil* be returned, sue out an *alias scire facias*; fifteen days between teste of the first, and return of *alias*, is sufficient.

Of the alias.

Alias must not issue till return of *scire facias* tested on the return day, if proceedings by bill; if by original, on the *quarto die post*.

Scire facias need not lie in office.

A *scire facias* in error need not lie in the sheriff's office four days before the return of it, as a *scire facias* against bail must. *Gross v. Nash*, Burr. 2439. *Miller v. Yerraway*, Ib. 1723.

The *scire facias* is taken to sheriff's office, and return of *nihil* or *scire facias* thereon as in other cases.

Whence *scire facias* must issue.

The *scire facias quare* after transcript into B. R. must issue from that court. Bar. 432.

No plea allowed to it.

As this writ is only used as a method to bring the party to assign errors, no plea to it is allowed; nor will the court grantoyer of the *scire facias*, or suffer any answer thereto but an assignment of errors. Str. 679, *Miles v. Walsbam*, Mich. 5 Geo. 2. *Parker v. Staunton*, Ld. Ray. 1414.

Of the rule on *scire facias*.

Upon the return of *scire feci*, or of *nihil* to the *alias*, give a rule on *scire facias*, thus:

In error.

E. F. v. C. D. rule on *scire facias*, T. S. attorney.

It is a four-day rule exclusive of the day given.

Intent thereof.

This rule is to bring the plaintiff into court as he has no day given him by the writ of error.

Of rule to assign errors;

Then give a rule to assign errors; this may be given on the same day that the rule on *scire facias* is served, and

and will then both expire at the same time; both rules being consistent, for the same purpose of compelling plaintiff to appear and proceed, 2 D. & E. 17. when to be given.

The only way of proceeding in order to nonprofs the writ, and so get costs, is by serving rule on *scire facias*, and then a rule to assign errors; for without such rule to assign errors, a writ of error cannot be *nonprossed*. *Leith v. McFarlane*, Burr. 1772. Nor can a rule to assign errors be given until a rule is served to appear on the *scire facias*. Str. 917, *Marshall v. Cope*. Of nonprossing the writ; how to nonprofs it.

But upon entering the rule to assign errors with clerk of the rules, and serving a copy thereof on plaintiff's attorney, if no assignment of errors are left with defendant's attorney, he may *nonpross* the writ and take out execution, and shall have his costs according to statute 8 & 9 W. 3. c. 11. Of execution and costs thereon.

For this purpose, defendant's attorney must enter all the proceedings on the roll, beginning with the transcript as of the term the transcript is of; sign judgment thereon at the King's Bench office on a proper stamp, tax costs, and sue out execution. [For form of *nonpross*, see *Appendix, W.*] Of the entry on the rule.
[Appendix, W.]

Whereas if the writ of error be not regularly *nonprossed*, but plaintiff suffers judgment to pass upon two *nihilis*, and does not assign errors before the rule on *scire facias* expires, though the defendant may sue out execution, yet he will be entitled to no costs in error, and the writ of error may still be proceeded upon. 2 D. & E. 17. How if judgment by default without a *nonpross*.

If the first writ of error is *nonprossed*, and then another brought, the court on motion will give leave to take out execution. King's Rep. 243. If another writ brought after *nonpross*.

Rule to shew cause why *nonpross* of a writ of error, for want of transcribing the record, should not be set aside with costs. Objected, that no final judgment is entered, and therefore no transcript could be made. The *nonpross* ordered to be set aside, but without costs. It appeared that the clerk of the judgments was paid his fee, by plaintiff's attorney, for entering the final judgment, which he had neglected to do; but plaintiff When *nonpross* set aside.

did not pray any rule against him. *Stone v. Rawlinson* in error, Barnes, 195.

How defendant
to proceed after
nonprofs.

In *ejectment*, verdict was for plaintiff; whereupon defendant brought error, and entered into a recognizance to pay costs in case of *nonsuit*, *discontinuance*, or *affirmance*, pursuant to the 16 & 17 Car. 2. c. 8. sec. 3. and it was held, that when *plaintiff* in error is *nonsuited*, defendant need not bring a *scire facias* or *debt* on the recognizance, but may sue out an *elegit*. *Short v. Heath*, B. R. Mich. 12 Geo. 2.

D.

D. Of alleging Diminution.

If the plaintiff in error appears to the *scire facias* and proceeds, the next step is to assign errors.

An assignment of errors may be general or special; and in either case must be signed by counsel.

Diminution,
why so called.

But it frequently happens that the errors assigned are the want of an original writ or a warrant of attorney, or some other matter necessary to render the record perfect or complete, which is termed *alleging diminution* of the record. [For form thereof, see *Appendix, W.*]

[Appendix, W.]

Of the *certiorari*
thereon.

When this is done, the plaintiff in error prays a *certiorari* to issue to the proper officer to certify such original writ, warrant of attorney, or the like, which he ought regularly to get returned.

How to compel
plaintiff in
error to proceed.

But as this assignment of error is frequently only for delay, and not founded in truth, it is necessary for the defendant to force the plaintiff to proceed, and to get the *certiorari* returned. [For form of *certiorari* and return, see *Appendix, W.*]

[Appendix, W.]

Rule to return
certiorari;

For which purpose, the defendant in error may immediately get a rule from the master to return the *certiorari*, and serve the plaintiff's attorney with a copy thereof; upon which the plaintiff is obliged to make out the *certiorari*, to get it signed by the signer of writs, to leave it with the *custos brevium* of common pleas, to certify, and to get it returned and filed with the clerk of

what plaintiff
must do there-
on.

1554.
Aff
certior
11 Ca

of treasury at Westminster; where defendant's attorney at the expiration of the rule searches for it; and if found there, bespeaks a copy; but if not returned and filed within the four days (the time of the rule), the defendant may give a joinder in error of *in nullo est erratum*, and enter on the record a *non misit breve* without taking any notice of the diminution, and proceed to argument as in cases of demurrer, and the assignment of error as to that part is of no effect. Sal. 267.

How defendant to proceed.

If not returned.

But the defendant in error may come in *gratis*, and confess the error by reason of the want of an original, or the like, and then there is no occasion for a *certiorari* to be sued out and returned. Sal. 267. Ld. Ray. 1156.

Defendant may confess the error;

But the defendant in error cannot himself at his own expence take out a *certiorari* and procure a certificate thereon; he can only serve plaintiff with a rule to return it; for the error is not completely assigned by plaintiff in error until the certificate is returned, by which it appears that there was no original, or the like, in the cause. Com. 115.

but he cannot himself get *certiorari* returned.

Certiorari must not bear teste before the errors are assigned.

When *certiorari* to be tested.

Plaintiff brought a writ of error upon a judgment against him in C. P. by *nil dicit*; and assigned in Trinity term the want of an original, and the want of a warrant of attorney; and one *certiorari* was directed to the chief justice as to the warrant of attorney, and another *certiorari* to the *custos brevium* as to the original, which bore teste the 21st of June (which was before the errors were assigned), upon which the *custos brevium* returned that there was no original, &c. The defendant pleaded *in nullo est erratum*. And judgment was affirmed *nisi*, because the plaintiff in error ought to take out a *certiorari* to verify his error that there was no original; but this *certiorari* bearing teste before the assignment of the errors, could not be a *certiorari* upon that assignment of errors. *Bowers v. Mann*, Ld. Raym. 1554. Stra. 819.

After a *certiorari* has been returned, no second *certiorari* can issue without motion in court. R. E. 11 Car. 1.

No second *certiorari* allowed without motion.

Plaintiff in error
not allowed a
second cer-
tiorari;

If a variant original is returned on the first *certiorari*, the defendant in error may sue out a second *certiorari*. Salk. 266. But plaintiff in error cannot have a second *certiorari*. But see Leon. 22. Cro. Jac. 277. Bulf. 21. Plaintiff in error took out a *certiorari* of a wrong term, which did not verify his error, and now he moved for a second *certiorari*, which was denied; the court saying it may be granted to affirm, but not to reverse a judgment. *Merryfield v. Berry*, Str. 765.

But defendant is,

If a *certiorari* be prayed to certify an *original*, or a *warrant* of attorney of a wrong term, and the *chief justice* or the *custos brevium* return, that there is no *original* or *warrant* of that term, the defendant in error may make a suggestion of the right term, and pray a *certiorari*; which, when returned and filed, he may join *in nullo est erratum*, and enter it on the roll, paying the plaintiff's attorney 2 s. 4 d. for it,

In what cases.

Want of *original* was assigned, *certiorari* prayed, and return no *original*; afterwards the defendant applied to *chancery*; and upon affidavit, that instructions were given to the *curfitor* for an *original*, but they were lost, the court of *chancery* allowed, that the *original* should be supplied. Upon which the defendant in error prayed another *certiorari*, and an *original* was certified of the same term in which the default of an *original* was certified before; on which it was moved, that this was irregular; for, before the second *certiorari* was returned, the defendant ought to have given a copy of the *original* to the plaintiff's attorney; but the *master* informing the court, that the course was so when the second *original* certified was of another term, but not when it was of the same term, the motion was disallowed, Com. 118.

See also a case where defendant had a new *certiorari* in error upon a fine. 3 Leon. 106.

After *in nullo est erratum* pleaded, no diminution can be alleged, either by the plaintiff or defendant in error, without leave of the court.

Court may at
any time award
the for their

But the court can *ex officio* award a *certiorari* to supply a defect in the body of the record, even after *in nullo est erratum*

erratum pleaded. Salk. 270. It is called a *certiorari ad informandam conscientiam*. own information.

Want of original was assigned for error; the defendant, before the return of the *certiorari*, came in *gratis* and pleaded a release in bar, to which plaintiff demurred and defendant joined. *Per Cur.* The release is mispleaded for want of a *venue*, and it was agreed, that the court could award *ex officio* a *certiorari ad informandam conscientiam*, whether there was an original or not; *sed Holt cont.* Salk. 268.

If error be assigned in the *original*, and upon a *certiorari* granted an erroneous original is returned; and upon this, *in nullo est erratum* is pleaded; and after, the court *ad informandum conscientiam*, grant another *certiorari* for another original; and upon this a good original is certified; the court ought to intend that this is the original upon which the judgment was given, in favour of judgments, which ought to be intended to be good. Cro. Car. 91. Style, 176. 2 Roll. Rep. 362. Godb. 407. Roll. Abr. 765.

What the court will intend in favour of judgments.

On error of a judgment in *assumpsit*, by *nil dicit* in C. B. and writ of inquiry executed, and final judgment, plaintiff in error assigned the general errors, and also that there was no writ of inquiry or inquisition taken, filed, and remaining upon record in C. P. and prayed a *certiorari* directed to the *custos brevium*. To which he returned, that there was no writ of inquiry, &c. upon which defendant in error suggested, that there is a writ of inquiry in the custody of the *custos brevium* of the Common Pleas, of such a term affiled, and prayed a *certiorari*. To which the *custos brevium* returned, that upon search he found the writ of inquiry, &c. and then defendant set out the writ of inquiry, &c. which warranted and agreed with the record. And thereupon pleaded *in nullo est erratum*. And for the plaintiff it was insisted that judgment ought to be reversed, because the *custos brevium* could not return a fact upon the second *certiorari* in every particular, contrary to his return upon the first. And the court cannot tell to which return to give credit. *Sed non allocatur*. For there being a positive return of a writ of inquiry, which warrants the record, we will take that to be true. And judgment

judgment was affirmed. *Shipman v. Lethieullier*, Ld. Raym. 1476.

What original returned will warrant the proceedings.

When all the proceedings are in one and the same term, an original of that term will warrant the same, but not otherwise. 1 Keb. 327, *Booth v. Beard*. But an original of the term final judgment is given will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a precedent term. *Duke v. Sweeting*, 1 Willf. 181.

Of the difference between originals and warrants of attorney.

The case of *originals* differs from *warrants of attorney*; for it is sufficient if a *warrant of attorney* be filed at any time pending the suit, let it be which term it will. The stat. of Hen. 8. only requires a warrant of attorney to be filed in the cause: and the 4 Ann. requires it to be filed according to the course of the court; and that is, to have it filed any time pending the suit; but it is otherwise as to an *original writ*, for if there be proceedings in the action in a term *preceding the return thereof*, the original of a term after will not support them.

Defendant not to take advantage of his own neglect in not entering warrant of attorney.

Error of a judgment from C. P. on a judgment by default, the error assigned was, that there was no warrant of attorney for the defendant (the now plaintiff), entered on the record below. It was objected, that a man shall not take advantage of his own neglect in not making proper entries. To which it was answered, that in a judgment by default, the plaintiff is to make up the whole record, and therefore it is his own laches. But the court ordered the cause to stand over, till the court of Common Pleas could be moved to amend the record; and afterwards the *chief justice* of C. P. directed a proper warrant of attorney to be filed and entered, and thereupon a new *certiorari* issued, and the judgment was affirmed. *French v. Cornelys*, 1 Blackf. Rep. 453.

Court will not presume any thing against judgments, if no *certiorari* returned.

If the error complained of is want of an original, or the like, and no *certiorari* is returned, court will not presume any thing against the judgment, as that it might be a bad original, or the like.

Either that the original might be a bad one.

The case was error of a judgment in C. P. after a verdict. Want of *original* assigned for error, but no *certiorari* taken out to get the want of the *original* certified.

tified. *In nullo est erratum* pleaded. And when the cause came on in the paper, it was objected, that there ought to have been a *certiorari*, and a certificate made of the error; for it might be, that there was an ill original, and if that were returned, the plaintiff in error might take advantage of that, and that would not be helped by verdict, though the want of an original were. *Per Holt, Ch. Just.* If the want of an *original* be assigned for error, and the plaintiff in error does not take out a *certiorari*, and get a return to it, and the want of an *original* certified; the course is for the defendant to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari*; and if he does not get it done, as ordered by the rule, the assignment of error stands for nothing. But if the defendant in error will come in *gratis*, and confess the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad *original*, &c. that is another sort of error; and when the want of an *original* is assigned for error the court will never intend that there is a bad original, and judgment was affirmed. *Smith and others v. Steneard, Ld. Raym. 1156.*

Attorney and his wife sued by writ of privilege, and had judgment by default, on which error was brought in B. R. and want of a writ of privilege assigned for error. A *certiorari* was taken out to make good the error, but was not returned. And the court were of opinion, that if this suit was by writ of privilege, it was ill; but they held that it does not sufficiently appear to them, that it was by writ of privilege: for the recital in the declaration is not sufficient for them to found a judgment upon; but the writ of privilege ought to have been brought before the court, by the return to the *certiorari*, and therefore judgment was affirmed. *Drew & Ux. v. Rose, Ld. Raym. 1398.*

or that a writ of privilege was sued out wrongfully;

Error of judgment in C. P. after verdict in a suit against an attorney. General errors were assigned. And the plaintiff in error insisted that all actions in C. P. must be either by *original writ*, *original bill*, or *attachment of privilege*. But this action does not appear to have been by any of these ways, for which reason the proceedings were irregular, and therefore he prayed judgment. *Sed per Cur.* This being before us by writ of

or that there was no original.

of error, we cannot take notice whether there was any original bill or not, the defendant being sued as attorney, it not being assigned for error that there was no original bill. But in order to have taken advantage of this, the plaintiff in error should have assigned for error, that there was no bill, and took out a *certiorari*, and got it returned that there was none. Judgment affirmed. *Graddell and others v. Tyson*, Ld. Raym. 1441.

What may be returned on *certiorari*.

Continuances cannot be returned upon the same *certiorari* with the original. Salk. 269.

If upon error, diminution, want of original, warrant of attorney, &c. is alleged, and a *certiorari* is sued out, upon which a record is returned contrary to what is before returned, it cannot be received. *Tyson v. Hyllyard*, 2 Ld. Raym. 1122.

How to obtain an original, if judgment by default and error likely to be brought or actually brought for want of one.

When judgment is by *default*, in which case only an original is necessary, (for after verdict the want thereof is cured by statute,) if defendant, now plaintiff in error, has actually brought a writ of error; before defendant in error gives a rule to transcribe, he must obtain an original: which can only be done by petition to the master of the rolls, and is granted upon payment of costs to the plaintiff in error, in case he does not further prosecute the writ. A copy of petition must be served with the master of the rolls' order thereon, on plaintiff's attorney, and after service costs should be tendered, which, if accepted defendant may *nonpross* the writ, and sue out execution. [Appendix, W.] [For form of petition, see Appendix, W.]

The master of the rolls' order is carried to the curfitor, with the *præcipe*, who makes out the writ returnable the term on which proceedings are entered on the roll, which is to be left with the sheriff of the county where *venue* is laid and *nihil* returned thereto, and then carried to the *custos brevium* of Common Pleas and filed.

If plaintiff suspects defendant will bring a writ of error, he may, on the taxing of costs in original action, get the original allowed by prothonotary, and then carry *præcipe* to curfitor, and get it made out, and afterwards, if necessary, petition as above.

§. Of assigning Errors, Joinder in Error, of the Error Book, and of the *Scire Facias ad audiendum Errores*.

§.

The transcript on record ought to be entered by the plaintiff in error the same term it is brought into the office; but if he neglects so to do, the defendant in error may enter it. Of entering the transcript.

And the assignment of errors by the plaintiff ought to be in the same term in which the record is removed. When errors to be assigned.
Lutw. 354. F. N. B. 20. g.

Otherwise the defendant may *nonpross* the writ of error after a *scire facias quare*, &c. and *alias* returned *nihil*, and a rule thereon given to assign errors, which *vide ante*.

The errors assigned must be signed by counsel, and must be assigned in term, and not in vacation. How to be signed.
Reg. 203. Prac.

And must be assigned upon the record.

An assignment of errors may be either general or special. Errors general or special.

The plaintiff may assign for error, error in fact or error in law. F. N. B. 20. e. But he cannot assign both, for this will be double. 1 Roll. 761. 1. 35. 1 Lev. 105. 76. 1 Sid. 147. In fact or in law.

Nor can he assign several errors in fact, but he may several errors in law. F. N. B. 20. e.

In error from an inferior court, the plaintiff in error cannot allege diminution of the record. Sid. 40. 147. Nor can the defendant; but the court, if they see occasion, may award a *certiorari ad informandum conscientiam*. What error from inferior courts.

Nor can he assign for error matter contrary to the record. Cro. Jac. 21. 1 Lev. 76. 1 Salk. 262. 1 Lev. 313. Cro. Jac. 244. What may be assigned for error.

Nor

Nor matter which he might have pleaded. 1 Rol. 762. l. 40. Though judgment were by default. Though Dub. Cro. Jac. 547. But Carth. 124. says—Not matter which might have been pleaded in *abatement*.

How assignment to be engrossed, &c.
[Appendix, W.]

An *assignment* of errors is in the place of a declaration in error, and must be engrossed and delivered over to the defendants on treble-penny stamped paper. [For the form thereof, see *Appendix*, W.]

What are general errors and what special, see the abridgments and other books on the subject.

Of the *sci. fa. ad audiendum errores*.

[Appendix, W.]

As soon as the *transcript* is entered and the plaintiff hath also assigned his errors, and entered the same on record; if the defendant does not immediately plead, or join in error, the plaintiff may sue out a *scire facias ad audiendum errores*. [For the form thereof, see *Appendix*, W.]

Effect thereof.

If the *defendant* in error does not come in and plead, or join to the assignment of errors upon the return of the *scire facias ad audiendum errores*, the plaintiff may have an *alias scire facias*, &c. and upon default thereto, the plaintiff in error must proceed to argument, and will be heard *ex parte*.

After judgment for the defendant, the plaintiff brought error and assigned infancy in defendant, and appearance by attorney, and then took out a *scire facias ad audiendum errores*; and after a *scire feci* returned, entered the default; and on producing the record, the judgment was reversed on motion, without making it a *concilium*, or putting it in the paper. *Walmesley v. Roson*, Stra. 1210.

Now disused, why.

But the writ of *scire facias ad audiendum errores* is now seldom sued out, as the *defendant* appears usually *gratis*; or the plaintiff in error, after his assignment of errors, takes a rule out for the defendant to appear thereto, and serves a copy thereof on the defendant. *Moseley v. Corks*, Carth. 40.

Of the joinder in error.

If the errors assigned are *special*, the joinder in error must be engrossed on stamped paper, and delivered over to the

the plaintiff's attorney: but if the errors assigned are *general*, the defendant's attorney may join in error directly, and deliver the common joinder *in nullo est erratum*, on a treble-penny stamped paper, to the plaintiff's attorney, paying him 2s. 4d. for entering the same on record.

Mansfield and Way.

Hilary term, thirty-sixth George the Third.

A. B. }
ats. } There is not any error.
C.D. }

Thomas Smith, attorney for the defendant in error.

The joinder need not be signed by counsel.

By pleading *in nullo est erratum*, the defendant admits the record to be perfect, and cannot afterwards allege diminution. 1 Salk. 270. Effect thereof.

The joinder of "*in nullo est erratum*" to an assignment of error in *fact*, is a confession thereof, if the error in *fact* be well assigned; for if error in *fact* be assigned, and the defendant in error would deny it, he should not join *in nullo est erratum*; but ought to take issue upon it, so as to have it tried by the country. Sid. 93. Raym. 59. How, if the error be in *fact*.

But if the assignment is of an error in *fact*, and that be ill assigned, "*in nullo est erratum*," is no confession of it; as if it be assigned, that such a one at the time of the return of the *venire*, was not sheriff, and the record be removed; there, *in nullo est erratum* is no confession of that *fact*; because the record thereof is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*. Cro. Jac. 12. 29. 521. Raym. 231. Cro. Car. 421. Roll. Abr. 758.

Also if an error in *fact*, that is not assignable, be assigned, and *in nullo est erratum* be pleaded, it is no confession; as if it be assigned, that on such a day there was no court sitting; because that is against the record, and then *in nullo est erratum* is only a demurrer. So if a man says, he did not appear, and the record says he did,

did, *in nullo est erratum* is no confession, but a demurrer, because it is against the record. Bac. Abr. tit. Error, 2 vol. 218. and authorities there cited.

Defendant
should plead
thereto, and go
to trial.

If the plaintiff in error therefore assigns error in *fact*, which is assignable, and the defendant would not confess it, he must not join in *nullo est erratum*, but plead thereto, and then the parties go to issue upon the error in fact, the record is made up, as in other cases, and the matter goes to a jury.

How, if the
error be in law.

But where the defendant joins in *nullo est erratum*, the parties thereupon are at issue in law for the determination of the court; and in such case either of them may enter the same on record, and move for a *concilium*, or day, for arguing the errors. Then the cause for argument must be entered with the clerk of the papers, and error-books made up and delivered to the respective judges of the court, in like manner as upon argument of a *demurrer*.

Of paper-books,
&c.

Two days at least before the cause comes to be argued, paper-books must be delivered to the judges. 2 Jac. 2. Though that rule of court says *four days* before, yet the practice has been for a long time past to deliver the paper-books only *two days* before.

The *plaintiff* in error delivers paper-books to the *chief justice* and the *senior judge*, the *defendant* to the two *junior judges*.

The court will not hear arguments unless books be delivered to all the judges; therefore it behoves the attorney who expects the judgment of the court to be for his client, to deliver all the books, especially as he will be allowed in his costs for the copies he makes for the other side. Mich. 17 Car. 1.

The court has refused to hear any argument on the side of the party who hath neglected to deliver books, though he has been willing to pay the other side for them.

If plaintiff's attorney therefore neglects to deliver his books, let defendant in error deliver all, and judgment will of course be given against plaintiff.

Give

Give brief to counsel, with one guinea to pray judgment when it is called on.

The paper-books are a copy of the entry on the roll, which must be of the whole proceedings, beginning with the writ of error to the end of final judgment in C. B. and then the assignment of errors and joinder intitled As yet of — Term, 36 Geo. 3. (the term the transcript is of). What they must contain.

When judgment is obtained, get rule from clerk of rules, on which the master will tax costs and afterwards mark the roll, which must be had of the clerk of treasury for that purpose. How to proceed on getting judgment.

§. Of the Judgment and Execution.

§.

If a judgment be below for the plaintiff, and error is brought, and that judgment reversed; yet, if the record will warrant it, the court ought to give a new judgment for the *plaintiff*. Cro. Car. 443. Salk. 401. Hob. 194. But if the judgment be erroneous and against the plaintiff, that ought to be reversed, and no new judgment given for the plaintiff. *Ibid*. What judgment court should give on error.

If any erroneous judgment be given for the defendant, and that is reversed, and the merits appear for the plaintiff, he shall have judgment. But if the merits be against the plaintiff, the defendant shall have a new judgment. So it is in the Exchequer Chamber, for they are to reform, as well as to affirm or reverse it. *Ibid*.

But in Salk. 262. it is laid down, that where the *plaintiff* brings the writ of error, and the court reverses the judgment below, they give a new judgment for the plaintiff; but otherwise if the defendant below brings the writ of error, for then they only reverse it. So in Burr. Rep. 2156. if error is brought by the *plaintiff* below, the court upon the reversal of the judgment, may give such judgment as the court below should have given: but if error is brought by the *defendant* below, the court can only reverse it. S. P. *Wyvill v. Stapleton*, Stra. 617.

And *per* Lord Mansfield, in *Cuming v. Sibley*, Burr. 2490. where the *plaintiff* below brings a writ of error, we may not only reverse what is wrong, but give judgment for what is right. Where the *defendant* below brings a writ of error, we only reverse such wrong part of the judgment as he complains of.

Of reverſing it in part and affirming in part.

A judgment cannot be reversed in part and affirmed in part, unless part is by *common law* and part by *statute*. Salk. 24. As where in *assumpsit* and two several counts laid, one on a promissory note, on which plaintiff had counted as on a bill of exchange upon the custom of merchants. *Non assumpsit* was pleaded, entire damages given, and judgment given accordingly. And on error brought in B. R. it was held, 1. That plaintiff could not declare on a promissory note, as on a bill of exchange, and as there could be no such count or action, so there could be no such damages. 2. That they could not reverse the judgment in part, viz. as to one count, and affirm it as to the other, and denied the case of *Jacob v. Will*, Hob. 6. and took the difference above, viz. where the judgment is partly by the common law and partly by statute, it may be reversed in part; for that which was a judgment at common law, will remain a judgment, and be complete without the other.

How if error be on fine.

If on error brought into B. R. of a fine in C. B. the same is reversed, a *certiorari* goes for the foot of the fine, and it is cancelled in B. R. If it is affirmed the transcript is remitted into C. B. because there is no chirographer in B. R.

Of the execution on affirmance.

Upon affirmance of the judgment, the *defendant* in error may take out his execution, either a *fi. fa. ca. fa.* or *elegit*, which writ of execution recites the former judgment below, the removal of the record into the court above, and the affirmance thereof, together with the costs given upon the affirmance.

Where it must go.

Of the testatum.

The writ of execution must go into the county where the original *venue* was laid, and if in any other county, a *testatum* is to issue, for which the first writ must issue and be returned.

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Although on a writ of error from the Common Pleas a transcript only is removed into the King's Bench, yet the King's Bench award execution. Cow. 843. By what court awarded.

When judgment is reversed, the party shall be restored to all that he has lost, and a writ of restitution shall be awarded. 2 Cro. 698. 4 Mod. 161. For form thereof, see *Appendix, W.* Of the writ of restitution. [Appendix, W.]

Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed; there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid, there must then be a *scire facias* suggesting the matter of fact, viz. the sum levied, &c. But where judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution, but an attachment shall be granted upon the rule for contempt. Anon. Salk. 588. When sci. fa. necessary.

SECTION III.

Of proceeding in Error from inferior Courts into the King's Bench.

The court of King's Bench by its constitution, has a superintendancy over all inferior jurisdictions, so that whenever there is any error in the proceedings of an inferior court of record, a writ of error lies into the King's Bench; except in a very few instances, mentioned in the first section of this chapter. [For jurisdiction of this court, see *Appendix, A.*] Jurisdiction of K. B. [Appendix, A.]

The mode of bringing and prosecuting such writ of error is as follows:

Let the plaintiff in error make application to the clerk for a writ of error, which writ may bear *teste* before the judgment given; and this is the usual course for preventing and superseding the execution; but then judgment below must be given before the return of it. 3 Keb. 308. Vent. 96. Latch. 133. For if it should be How writ of error procured.

be made returnable before judgment given, it is such a fault as is not amendable. Stra. 807.

Make out *præcipe* for curfitor, who will prepare writ of error returnable in the King's Bench.

Allowance and
superfedeas.

As soon as the writ is made out, the party who sued it must carry it to the *prothonotary* of the inferior court, and get it allowed; and if execution should have been sued out, that officer will also grant a *superfedeas* to the same; but if no execution should have issued, the allowance of the writ of error is of itself a sufficient *superfedeas*, and no execution can then be taken out.

Bail thereon.

Now, by the stat. 19 Geo. 3. c. 70. bail in error must be put in on all writs of error from inferior courts. For the time and manner of putting in bail, see *ante*, sec. 2. A.

Rule to trans-
scribe.

On the return of the *writ of error*, the *defendant* in error should serve the *plaintiff* in error with a rule out of the inferior court to transcribe the record, who, upon service thereof, should bespeak the transcript of the record of the proper officer below, and carry the same into the office, and file the same, if in B. R. with the *signer of the writs*, who is the proper officer for this purpose.

Of writ of exe-
cutio judicii.

The transcript should be filed before the second seal, or the *defendant in error* may apply and get a *certificate* from the office, that the *writ of error* is not returned, and the transcript brought in; and may thereupon apply to the *curfitor* for a writ of *executio judicii* directed to the court below, and commanding them, that, notwithstanding the *writ of error*, they proceed to execution on the said judgment.

Of subsequent
proceedings.

But if the transcript is brought in, the cause is then in the court of King's Bench, and defendant proceeds to sue out a *scire facias quare executionem non*, and in all other respects the parties pursue the same steps as are directed to be taken in proceeding in error from the Common Pleas into the King's Bench; for which see *ante*, sec. 2. B. C. D. E. F. and for the forms of the

[Appendix, W.] writs, &c. [see *Appendix*, W.]

SECTION IV.

Of proceeding in Error from the King's Bench into the Exchequer Chamber.

Formerly no writ of error lay of a judgment in the King's Bench but in *parliament*, and as the subjects were often disappointed of their writ of error by the parliament not sitting, or by their being employed in public business when they did sit:

By the 27 Eliz. c. 8. it was enacted, "That where any judgment shall, at any time hereafter, be given in the said court of the King's Bench, in any suit or action of debt, *detinue*, covenant, account, action upon the case, ejectione firmæ, or trespass, first commenced there, (other than such only where the queen's majesty shall be party,) the party plaintiff or defendant, against whom any such judgment shall be given, may, at his election, sue forth out of the court of Chancery a special writ of error to be devised in the said court of Chancery directed to the chief justice of the said court of the King's Bench for the time being, commanding him to cause the said record, and all things concerning the said judgment, to be brought before the justices of the Common Bench, and the barons of the Exchequer into the Exchequer Chamber, there to be examined by the said justices of the Common Bench, and barons afore said; which said justices of the Common Bench, and such barons of the Exchequer as are of the degree of the coif, or six of them at the least, by virtue of this present act, shall thereupon have full power and authority to examine such errors as shall be assigned or found in or upon any such judgment; and thereupon to reverse or affirm the said judgment as the law shall require, other than for errors to be assigned or found for or concerning the jurisdiction of the said court of King's Bench, or for any want of form in any writ, return, plaint, bill, declaration, or other pleadings, process, verdict, or proceeding whatsoever; and that after the said judgment shall be affirmed or reversed, the said record, and all things concerning the same, shall be removed, and brought

This court instituted by 27 Eliz. c. 8.

In what cases this writ of error lies.

“back into the said court of the King’s Bench, and such further proceeding thereupon had, as well for execution as otherwise, as shall appertain.”

This statute only gives the party his option in such cases, of bringing his error in Parliament or the Exchequer Chamber *.

Construction of statute.

The writ of error can only be returnable in the Exchequer Chamber in the *seven cases* mentioned in this act, where the suit was *first commenced* in B. R. Therefore if a suit is by *original* in B. R. a writ of error on a judgment thereon must be returnable in Parliament, and cannot be in the Exchequer Chamber, because such a suit is not commenced there, but in Chancery, where the *original writ* is purchased.

No writ of error here unless suit by bill.

A writ of error therefore can only be returnable on judgments in B. R. in actions of *debt, detinue, covenant, account, action on the case, ejectment, and trespass*, first commenced in B. R. which must be by *bill*. 3 Salk. 148.

Not thoroughly explained.

This is the construction which seems uniformly to have been put upon the statute, though in Comberb. 295. Holt, Ch. Jus. says, “It hath obtained that no writ of error lieth in the Exchequer Chamber where the action was commenced here by *original*, but I never understood the reason of it, the statute says “*first commenced* here.” Doug. 352. n.

To what actions the statute extends.

Though the words “*action on the case*” are general, and seem to comprehend every action on the case, yet it hath been held, that this statute does not extend to

* It is to be observed that there are three distinct courts of Exchequer Chamber. The one is by the *common law* holden before the *twelve judges*, for the determination of any matter of great doubt and importance, or any cause *adjourned* there when any court is divided in opinion, or any special verdict found in any criminal case. The other two are constituted by acts of parliament, the one by 31 Edw. 3. c. 12. consisting of the chancellor, treasurer, and justices of each bench, who are empowered by writ of error to review the judgments given in the common law court of the Exchequer, its decrees in equity being subject to appeal only in the House of Lords, and the other by the stat. 27 Eliz. consisting of the justices in C. B. and barons of the Exchequer, who have authority by writ of error to reverse or affirm judgments in K. B. not so generally as that created by the stat. Edw. 3. but in certain actions expressly enumerated and commenced as therein specified. 1 Woodeson Estin. 122.

the

the action of *scandalum magnatum*, although that is an action upon the case: so that *error* does not lie in *cam. scacc.* by force of this statute of Elizabeth. For the statute of *scand. mag.* 2 Rich. 2. c. 5. was made for the preservation of the public peace; and besides, an action thereon is of an higher nature than an action upon the case, being founded specially on a statute. Cro. El. 142. Ld. Raym. 954.

But the statute extends to an action of debt on the statute of usury, though a penal action. *Lloyd qui tam* v. *Skutt*, Doug. 320. To qui tam actions.

The Exchequer Chamber, under this statute, hath nothing to do with errors in *fact*. 2 Lev. 38. 1 Vent. 207. 2 Mod. 194. Com. Rep. 597. No writ for error in fact.

This writ of *error* is obtained of the *curfitor* in like manner as all other writs of error are; and by Reg. East. 36 Car. 2. every attorney who shall sue out any writ of error on any judgment of this court returnable in the Exchequer Chamber, shall forthwith allow such writ of error with the *clerk of the errors* of this court for the time being, and no execution shall be stayed until such allowance. How writ obtained and allowed.

And where special bail is required, if the plaintiff upon such writ of error does not *within four days* after the allowance thereof put in *special bail*, the plaintiff in the action may proceed to take out execution, notwithstanding such writ of error. Same rule. Of bail thereon.

If special bail is put in, the *plaintiff* in error, or his attorney, must forthwith give notice to the *defendant* in error, or his attorney; and if the *defendant* in error does not except against such bail *within twenty days* after such notice, such bail shall be allowed. Mich. 5 W. & M. Excepting thereto, &c.

For the manner of putting in and excepting to bail, &c. see *ante* sec. 2. B.

When bail put in, if any required, if not upon the allowance of the writ of error, give a rule to transcribe, if plaintiff in error means to proceed, let him obtain transcript as directed *ante*, sec. 1. B. Pay the transcript money, and get it examined and complete within the Rule to transcribe.

After transcript
of whom rules
got.

the time of the rule which is eight days. The transcript is delivered over to the clerk of the error of the Exchequer Chamber: all the rules, until the making up and delivering over the transcript, are given by the *clerk of the errors*; but after delivery of the transcript, all rules, &c. are given by the *clerk of the errors* of the Exchequer Chamber.

All writs issuing out of the Exchequer Chamber are witnessed by the chief justice of the Common Pleas.

Of alleging di-
minution.

In the next term (the second) apply to clerk of errors of Exchequer Chamber for a rule to allege diminution, which is to be served on plaintiff in error. It is an eight-day rule from the service, if plaintiff does not allege diminution; upon affidavit of the service of the rule, clerk of errors will sign *non pros.* or he will send to plaintiff's attorney, which is more usual; and if no answer the next morning, he will sign *non prof.* But if plaintiff in error does not allege diminution, defendant the next term (the third) gets a rule from clerk of errors to assign errors and serves copy thereof on plaintiff's attorney. It is an eight-day rule from the service.

Of the non
prof.

Of assigning
errors.

Plaintiff may assign common errors or special ones in same manner as described, *ante*, sec. 2. So if he alleges diminution, he gets *certiorari* returned as therein above described.

Of joinder in
error.

In the fourth term, defendant may plead *in nullo est erratum*, set down the cause, move for judgment, and four days after affirmance, get the costs taxed, and sue out execution; but before the writ of execution is returnable, apply to clerk of errors in Exchequer Chamber for transcript, which must be taken to the King's Bench treasury.

Of the notice
for arguing
errors.

But if the *plaintiff* in error, after errors assigned in the Exchequer Chamber, intends to argue the same, he must give ten days notice to the *clerk of the errors* there, before they shall be argued; and copies of the paper-book in error must be made and delivered by the parties. The *plaintiff in error* delivers books to the judges of the Common Pleas, and the *defendant* to the barons of the Exchequer four days before the hearing of the cause. R. Cart. 33 Car. 2.

In

In the Exchequer Chamber, there are only two return days in each term, one *the general affirmance day*, appointed by the judges of that court for the general affirmance or reversal of judgments, and held a few days after the beginning of the term. The other, called the *adjournment day*, held a few days before the end of the term, which is for finishing any business left undone on the former day. Causes may be set down for the latter day, but the fees are much higher, and they must be set down two days before the adjournment day. Imp. K. B. 678.

Of the return days in Exchequer Chamber for argument, &c.

It is observable, that the practice has always been to send only a transcript of the record into the Exchequer Chamber; but by the statute, the *record* is to be brought there. Doug. 352. n.

Transcript only sent, why so.

As the transcript however is only sent, it is absolutely necessary, whenever judgment is given in the Exchequer Chamber, that the transcript be sent back to the King's Bench, and a *remittitur* entered; for execution thereon must issue out of the King's Bench.

Of the remittitur.

So, if a writ of error abates in *cam. scacc.* or is discontinued, there must be a *remittitur* entered in B. R. for without such *remittitur* it cannot appear to the court of King's Bench, but that the writ of error is still depending in the Exchequer Chamber. But if it appears that a *remittitur* was entered, the court will not examine into the time of the entry. Carth. 237. 2 D. & E. 737.

When necessary.

If error is brought by many in the Exchequer Chamber, and some die, a *remittitur* should be entered to warrant execution in B. R. against the survivors. Carth. 236.

Upon a special verdict, the judgment was in B. R. for the defendant, which judgment was reversed in the Exchequer Chamber. Besides the reversal, that court gives a complete judgment for the plaintiff, viz. *that he do recover*. Carth. 319. Ld. Raym. 10.

Judgment for defendant on demurrer was reversed in the Exchequer Chamber; and judgment *that the plaintiff*

tiff do recover was given, &c. But because that court had not power to award a writ of inquiry, it was sent into B. R. for the execution of that writ, and thereupon to give final judgment. *Vide* Carth. 319. *Ld. Raym.* 10. and authorities there cited.

Of charging in execution.

If the plaintiff recover a judgment against two defendants in B. R. and one of them bring a writ of error in *cam. seacc.*, the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of B. R. notwithstanding the writ of error might have been quashed immediately because not brought by both defendants. *Larocke v. Wafbrough* and another, 2. D. & E. 737.

For costs in error, and in what cases interest will be allowed, see *post*. ch. xxi.

SECTION V.

Of proceeding in Error returnable in Parliament.

Nature of the proceedings.

If a judgment apprehended wrongful and illegal be given in the King's Bench, or even in the Exchequer Chamber, the party thinking himself aggrieved may upon a petition of right made to the king, (which petition is not, says Sir Edward Coke, *ex debito justitia* but for decency, because such judgment was *coram rege*, and which form having been thus introduced is still preserved,) and upon his answer thereunto "*fiat justitia*," have a writ of error directed to the chief justice of the King's Bench for removing the record without delay, in *presens parlamentum*, and thereupon the roll itself and a transcript in parchment is to be brought by him into the Lords' House; and after the transcript is examined with the record, the chief justice carries back the record itself into the King's Bench; and then the plaintiff is to assign the errors. This assignment of errors is to be in writing, and left with the clerk of the Parliament. The adverse party denies that there is any error, and prays, "That the court of our lord the king, before the king in his parliament, may examine the record,"

"process."

"process, and matters for error assigned, and that the former judgment may in all things be affirmed." This is called joinder in error. Questions of fact are not examined in this channel of jurisdiction.

The judicial power is only in the lords; but legally and virtually it is the judgment of the king, as well as of the lords, and perhaps too, says chief justice Holt, of the commons; although it was declared in the first year of Henry the Fourth, that all judgments appertained to the king and lords, and not to them.

In whom the judicial power resides.

The cause is determined by the majority of the lords present, however small the number, no proxies being allowed, and their determination is final, this being the dernier resort.

The dernier resort.

This resort to parliamentary decision by writ of error, to revise judgments at law, is of the earliest antiquity; not owing its origin to any positive statute, nor determinable to any certain period. It seems indeed, by the principles of our government, hardly capable of restraint or diminution. The stat. 4 Hen. 4. c. 23, which was passed to prevent the irregular re-examination of judgments given in the king's courts, and which recites as the grievance to be remedied, that, after such judgments, parties were brought sometimes before the king, sometimes before his council, and sometimes before the parliament, expressly saves the proceeding by writ of error, which exception refers (notwithstanding the former expressions) to this high tribunal, as well as to inferior judicatures. This judicial supremacy of the lords, was at all times before and since the passing of that law alike undisputed and undoubted.

Its antiquity.

The judgments which are immediately examinable by writ of error in Parliament, are given in the King's Bench, or in one of the several courts of Exchequer Chamber. See note, p. 518.

What judgments examinable by this writ.

If an action be prosecuted in the King's Bench by original writ out of Chancery, recourse must be had directly to the House of Lords; but in cases where the stat. 27 Eliz. c. 8, allows the Exchequer Chamber thereby created, to interpose, it only gives the election to the party

How if action in King's Bench by original. How if by bill.

If action in
Exchequer.

Of the common
law court of
Exchequer
Chamber.

Of error from
the law side of
Chancery.

Of judgments
in C. B.

This writ how
obtained.

Allowance.

party thinking himself aggrieved, and does not take away the common law method of relief in parliament. Indeed it has been doubted, whether this court of Exchequer Chamber did not come into the place of parliamentary correction of erroneous judgments; but it is now clearly agreed and settled to be, if resorted to, an immediate tribunal. The court of Exchequer Chamber, constituted by the stat. 31. Ed. 3. c. 12. has been determined to be a necessary stage between the law side of the Exchequer and the House of Lords. We may remember that there is a third court of Exchequer Chamber (see *ante*, sec. 4. n. p. 518.) subsisting by the common law, holden before all the judges of England, into which causes may be adjourned before judgment on account of their great weight and difficulty, and from which also a writ of error is returnable in parliament.

In the 14th year of queen Elizabeth a writ of error, from the law side of the Chancery, was brought in the King's Bench, where the prior judgment was reversed. This case however, and other authorities being cited before lord-keeper North, he declared that the judgments, even on the law side of his court were not liable to be reviewed in the King's Bench, and that he would grant injunctions against all such writs of error. Sir William Blackstone differs from this judicial opinion, which seems to him not well considered. I shall not presume to arbitrate in this controversy, observing only that there are several respectable authorities in confirmation of the lord-keeper's doctrine as well as those alleged by the learned commentator in opposition to it. 1 Woodeson Est. 223.

Lastly, as to the Common Pleas, it has been settled, at least ever since the reign of Edward the Third, that judgments there given, cannot be examined *per saltum* in the Lords' House, but must pass the King's Bench, and be there previously reversed or affirmed. 1 Woodeson's Estimate, 224.

The writ of error is obtained of the curfitor as in other cases, who procures the king's *fiat* or warrant, but a proper *præcipe* must be made. The clerk of errors will allow it, plaintiff in error must serve copy of allowance on defendant's attorney.

Bail

Bail if required is put in before a judge; clerk of errors will attend for that purpose. Notice of bail (same as in common cases, only saying that they are put in on the writ of error) must be given to defendant, who, if he pleases, may have a rule for better bail, and they must justify as in other cases, clerk of errors attending the court with his book for that purpose. Rule for allowance of bail must be got and served.

Bail.

When this writ is brought it is made returnable immediately, except on a *prorogation*; then *ad proximum parliamentum*; because during the session, they sit continually and have no vacation.

Return of writ.

When bail is perfected, get a rule to transcribe at clerk of errors; serve copy on plaintiff's attorney, who must leave copy of proceedings for clerk of errors to make transcript, and pay transcript-money as in other cases of error, otherwise *non prof.* will be signed; see *ante*, sec. 5.

Rule to transcribe.

It is an eight-day rule from the service.

The transcript when complete and examined is delivered by the clerk of errors to the chief justice of the King's Bench, who carries the record and transcript to the House of Lords; and after they are examined there, leaves the transcript and brings back the record.

How transcript delivered.

There is no *scire facias quare*, &c. on this writ (so that the proceedings are more expeditious); but on motion made in the house by a peer on behalf of the defendant, a day is appointed for plaintiff in error to assign errors. He is only allowed eight days for that purpose; if not done within time, a *non prof.* & *remittitur* issues from the clerk of the parliaments.

No *scire facias quare* but subsequent proceedings by motion.

For as soon as the transcript is carried to the House of Lords, a clerk in Parliament is employed to conduct the subsequent proceedings, and the days are appointed for plaintiff to assign errors, for defendant to appear and make his defence upon the assignment of errors by plaintiff, and for the hearing of the errors, upon motions made in the House by Peers. In which last case, sometimes

Who conducts proceeding after transcript.

Of assigning errors.

sometimes a short day will be appointed if the sessions are nearly at an end or the like.

Alleging diminution.

If plaintiff in error alleges diminution, and prays a *certiorari*, same to go without motion, and to be returned in ten days; if not so returned, nor good cause shewn for the neglect, the benefit of the writ will be lost.

Joinder in error.

Upon the assignment of errors, the defendant joins issue *in nullo est erratum*, a peer moves the house to appoint a day for hearing the errors; at which day both parties attend by counsel, usually two on a side, but they must not have more.

Printing cases, &c.

If printed cases are delivered, 500 on each side is the usual number, as 250 are to be left at the Parliament office for the lords and judges; they must be signed by counsel. On the hearing, the lords either affirm or reverse the judgment on which the clerk of the Parliaments draws a *remittitur*, by which the transcript of the record is remanded into the King's Bench, with the assurance or reversal to be entered of record.

Arguing, &c.

Remittitur.

Day for hearing how to be altered.

When a day is appointed for the hearing, it cannot be altered except by petition, of which two days notice must be given to the adverse party.

How counsel to proceed to open and argue the errors, see the order *infra* of 2 Mart. 1727.

For the regulation of the proceedings on error in Parliament, as above mentioned, the following orders have been made by the lords :

By *Ordo Dom. Procer. die Ven. 13 Dec. 1661.*

Orders of House of Lords.

As to prosecuting writ, paying fees, assigning errors ;

Forasmuch as upon writs of error returnable in this high court of Parliament, the parties therein often desire to delay justice, rather than to come to the determination of the right of the cause ; " It is therefore ordered, by the lords spiritual and temporal, in parliament assembled, that the plaintiffs, in all such writs, " after the same and the records be brought in, shall " speedily repair to the clerk of the parliament, and " prosecute

“prosecute the writs of error, and satisfy the officers
 “of this house their fees justly due unto them, by
 “reason of their prosecution of the said writs of error,
 “and the proceedings thereupon; and further, shall
 “assign their errors *within eight days after the bringing*
 “*in of such writs with the records*; and if the plaintiff
 “makes default so to do, then the said clerk, if the
 “defendant in such writs require it, shall record, that
 “the plaintiff hath not prosecuted his writ of error;
 “and that the house do therefore award that such plain-
 “tiff shall lose his writ, and that the defendant shall go
 “without day, and that the record be remitted; and
 “if any plaintiff, in any writ of error, shall allege di-
 “minution, and pray a *certiorari*, the clerk shall enter
 “an award thereof accordingly, and the plaintiff may,
 “before *in nullo est erratum* pleaded, sue forth the writ
 “of *certiorari* in ordinary course, without special peti-
 “tion or motion to this house for the same; and if he
 “shall not prosecute such writ, and procure it to be
 “returned *within ten days after his plea of diminution put*
 “*into this house*, then, unless he shall shew some
 “good cause to this house for the enlarging of the
 “time for the return of such writ, he shall lose the be-
 “nefit of the same, and the defendant in the writ of
 “error may proceed as if no such writ of *certiorari*
 “were awarded.”

alleging dimi-
 nution, &c.

And by *Ordo Dom. Procer. die Martis, 19 Aprilis 1698.*

The house taking notice, that upon appeals and writs
 of error, there have been of late several scandalous and
 frivolous printed cases delivered to the lords of this
 house; for preventing whereof for the future, it is this
 day ordered, by the lords spiritual and temporal, in par-
 liament assembled, that no person whatsoever do pre-
 sume to deliver any printed case or cases to any lord of this
 house, unless such case or cases shall be signed by one or
 more of the counsel who attended at the hearing of
 the cause in the courts below, or shall be of counsel at the
 hearing in this house: and this order to be added to the
 roll of standing orders, and affixed on the doors of this
 house, and the courts in Westminster.

Of printed cases
 signed by coun-
 sel.

And by *Ordo Dom. Procer. die Mercur. 22 Dec. 1703.*

Upon consideration of the great inconveniencies
 arising by motions and petitions for putting off causes
 after

Of altering day
fixed for hear-
ing errors.

after days have been appointed for hearing thereof; it is ordered, by the lords spiritual and temporal, in parliament assembled, that when a day shall be appointed for the hearing any cause, appeal, or writ of error, argued in this house, the same shall not be altered, but upon petition; and that no petition shall in such case be received, unless *two days notice thereof be given to the adverse party*, of which notice oath shall be made at the bar of this house; and it is further ordered, that this order be added to the roll of standing orders.

And by *Ordo Dom. Procer. die Veneris*, 21 Feb. 1717.

Of the certifi-
cate that dimi-
nution is al-
leged.

Ordered, that in all cases upon writs of error depending in this house, when diminution shall be at any time alleged, and a *certiorari* prayed and awarded before *in nullo est erratum* pleaded, the clerk of the Parliaments shall, upon request to him made, give a *certificate that diminution is so alleged*, and a *certiorari* prayed and awarded thereupon. And it is further ordered, that this order be entered on the roll of the standing orders of this house.

And by *Ordo Dom. Procer. die Sabbatis*, 2 Mart. 1727.

How counsel to
be heard on the
errors.

Upon report from the committee of the whole house, appointed to take into consideration matters relating to the proceedings on appeals, and writs of error; it is ordered, by the lords spiritual and temporal, in parliament assembled, that at the hearing of causes for the future, one of the counsel for the appellant shall open the cause, then the evidence on their side shall be read; which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side to be read, after which the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply.

what abates the
writ.

If the parliament is dissolved, the writ of error is abated, but not if it be prorogued. Ray. 383. 2 Leo. 93.

How if pending
writ action
brought against
bail.

If pending the writ of error, an action is brought against the bail below upon their recognizance, and a writ served upon them, it is a contempt and breach of privilege. P. Wms. 685.

If,

If, on a judgment in C. B. a writ of error be brought in K. B. and bail put in thereon and judgment affirmed, and afterwards a writ of error brought in parliament, a new recognizance must be given, for the first does not include costs to be assessed in the House of Lords. Str. 527. *Colebrooke v. Diggs*, Sal. 97.

When new recognizance must be given.

The court of K. B. will oblige defendant to enter into a rule not to commit waste pending the writ of error, if the justice of the case requires it. *Wharod v. Smart*, Burr. 1823.

As to the judgment itself, it may often happen, that a simple judgment of affirmance or reversal will not avail, but that the same sentence ought to be given, which should have been pronounced by the inferior court. Thus, in the action of ejectment, the prescribed judgment, if for the plaintiff, is that he recover his term in the estate in question; if for the defendant, it is formerly entered, that the plaintiff take nothing by his writ. If then, in this action, a prior judgment is given for the defendant, which is deemed erroneous by the lords, it is not sufficient, it is not going far enough, merely to reverse it; but there ought to be added, that the plaintiff recover his term, being the judgment which ought originally to have been given. If the lords neglect to make this order, it cannot be supplied in the court below; but the suitor must again resort to their bar to rectify the omission which has been done by motion in parliament before the remitting of his transcript of the record back into the King's Bench was entered in that Court. 1 Woodeson. Estim. 227.

Of the judgment;

when to be reversed;

when another judgment to be pronounced;

when only to be affirmed.

If the prior judgment, deemed erroneous, be given for the plaintiff, it is sufficient simply to reverse it. (*Pugh and another v. Goodtitle*. House of Lords, May 1787.)

So, if judgment be given in the Exchequer for plaintiff reversed in the Exchequer Chamber, and that reversal approved by the lords, it is sufficient that such second judgment be affirmed. (*Sutton v. Johnson*. House of Lords, May 1787.)

Or, if judgment below be given for plaintiff and deemed right, it need only be affirmed. (*East India Company v. Todd*. House of Lords, May 1788.)

So, if two former judgments concur, and are deemed right, they need only be affirmed, but probably discretionary costs would be awarded. (*Foley v. Burnell*. House of Lords, April 1789. 1 Woodeson, 228. N.)

Of the remittitur into B. R.

In a writ of error from K. B. to the House of Lords, only a transcript of the record is sent up, which must after judgment be remitted, and the King's Bench awards execution. *Vicars v. Haydon*, Cow. 843.

How if writ of enquiry necessary.

If judgment below was given for the defendant, upon *demurrer*, and the judgment be reversed, whereupon a writ of enquiry becomes necessary in such case, as the lords cannot award a writ of enquiry, the record is remitted to B. R. for them to award the writ of enquiry, and upon return thereof, then to give final judgment. *Ibid*.

How if remitted without proper judgment given.

Error of a judgment in B. R. for defendant, into *Dom. Proc.* and the judgment was reversed, and the record was remitted into B. R. whereupon the plaintiff moved B. R. for a new judgment. *Per Cur.* a new judgment cannot be given here contrary to that which is already given; the same court which reversed must give a new judgment. *Philips and Bury*, Carth. 319. *Ld. Raym.* 9, 10.

Of the costs in parliament.

The House of Lords give costs at their discretion, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below. *Burr.* 1097.

SECTION VI.

Of proceeding in Error coram nobis, &c.

Error coram nobis is where writ of error lies in the same court where record is.

There are some cases in which a writ of error lies in the same court where the record is. Thus, if upon a judgment in B. R. there be error in the process, or through

through the default of the clerks, it shall be reversed in the same court by writ of error sued there before the same justices, but not if the error is in the judgment.

All errors *in fact* on any judgment in B. R. are redressed there, and not in Parliament, nor in the Exchequer Chamber, for the statute 27 Eliz. does not extend to them; and the reason is, because error in fact is not the error of the judges; therefore the reversing such judgment is not reversing their own judgment. Why this writ lies.

Thus if an infant appear by attorney, and judgment be against him, this writ may be brought to reverse it; but then a guardian should be appointed to prosecute it as in other cases of infancy; and this is called a writ of error *coram nobis resident*. &c. because it recites that the record is *remaining before us*. Instances thereof.

Upon all judgments in criminal cases in B. R. error will lie in the same court, whether the error be in *fact* or in *law*; but it lies also in Parliament. 3 Sal. 147. Criminal cases.

If a writ of error once good, abates by plea or death, the inferior court cannot proceed; but the superior court and party may have a new writ *quod coram vobis residet*; but where the writ is ill, no new writ *coram vobis* can be had; as where the writ was to remove a judgment *quod fuit in curia nostra* where it was in the time of a *predecessor*. Latch. 198. Where it does or does not lie.

Error *coram vobis* lies not after an affirmance of a judgment, except in case of error upon a *fine* in C. B. after affirmance thereof in B. R. Salk. 337. although in this case of a fine, the transcript is only transmitted into B. R. upon error brought.

Error *coram vobis* does not lie in B. R. after error brought in *Cam. Scacc.* and judgment affirmed. Because, before the statute of Eliz. B. R. could not examine its own errors in *fact*, after an affirmance in parliament; and the Exchequer Chamber is now in the same degree with regard to B. R. in those cases within the statute, as the parliament was before, and is now. Stra. 690.

Error *coram vobis* lies not in the Exchequer Chamber. Cro. Jac. 620.

In F. N. B. 21. it is said, that a judgment cannot the same term it is given be reversed in B. R. without a writ of error, though a judgment in the Common Pleas may; but there seems no foundation for this distinction. Moor, 186. pl. 332. Yelv. 157. Pop. 181. For during the whole term in which any judicial act is done, the record remains in the breast of the judges of the court; and therefore the roll is alterable during the term, as they shall direct. But when the term is past, the roll is the record, and admits of no alteration. Co. Lit. 260. a.

When a record is removed upon error brought from C. B. or other inferior court, into B. R. and the same writ of error is quashed for any other fault than variance, error *coram vobis* lies in the same court to which the record is removed. Co. Ent. 289. 1 Stra. 607. and in such case such writ of error is the only writ that can be had. *Ibid.* Ld. Raym. 1403.

When errors are assigned, and afterwards that writ of error is discontinued, the plaintiff in error may have another writ *quod coram vobis residend.* and upon this new writ may assign other errors than those he assigned before, either within or without the record, and is not bound to the same errors.

This writ of error *coram vobis* recites the former writ of error, and must recite it accurately; for where such writ recited the former writ to be returnable *coram nobis*, where it was before the king, and the late queen, it was quashed. Ld. Raym. 151. Carth. 370.

How it operates
as superedeas

How to sue it
out,
and proceed on
it.

It is generally laid down in the books of practice, that this writ does not operate as a *superedeas*, and that no bail is ever required thereon, but in Mr. Impey's Practice, K. B. 1793, which I take to be correct, the contrary is holden; and the mode of proceeding is, to make *præcipe* for curfitor in the county where *venue* is laid, when the writ is obtained to get it allowed by the master, and to serve the allowance on the opposite attorney,

torney, which shall operate as a *superfedeas*, upon the plaintiff in error putting in and justifying bail within four days after such allowance.

The rule for allowance is drawn up to the above effect. Allowance.
When the writ is allowed, and notice thereof given, and bail perfected, get a rule of the master for plaintiff to assign errors, it is a four-day rule from the service. Bail.
If errors not assigned within the time, a *nonpross* may be signed.

Upon the assignment of error *in fact*, if the error *in fact* is assignable and well assigned, the defendant may confess it. Salk. 268. But a defendant can never confess error in law. Assignment of errors.

But if the error in fact is not truly assigned, the defendant may plead thereto, upon which the parties are at issue in fact; and that must be tried by a jury. The record for trial is then made up the same as in other cases, and either party may carry it down; and in such case, if the issue is found for the plaintiff in error, he must move to put the cause in the paper for argument, and then upon producing the *possea* the court will give judgment of reversal.

Or if the error in fact assigned is not assignable for error, then the defendant may join in *nullo est erratum*, which is in nature of a demurrer, and the same is argued in court as in other cases. Operation of plea in nullo est erratum.

Where matter of fact is insufficiently alleged, in *nullo est erratum* is a demurrer. So it is if matter of fact is alleged against the record. But if matter of fact is well set forth with matter of law, it is a demurrer as to the doubleness, but that must be specially assigned; or otherwise, upon in *nullo est erratum* pleaded, the matter of fact will be confessed, and the matter of law referred to the judgment of the court.

Error *coram vobis*, and infancy assigned, a *scire facias ad audiendum errores*, and *scire feci* returned; but defendant did not appear and join in error; on which plaintiff applied to know what to do. The court directed him to put it in the paper, without taking out How if defendant does not join in error.

any rule to join in error; and when it came on, the judgment was reversed. *Thatcher v. Stephenson*, Stra. 144.

Error in C. B. infancy assigned. *Doubt del court*, and feigned issue, which was found for plaintiff in error, and the judgment was reversed on return of the *poslea*, upon motion, without argument in the paper, but within a day or two after. *Osborn v. Barrington*, Stra. 127.

SECTION VII.

Of proceeding in Error tam quam.

Writ of error
tam quam,
what.

A writ of error *tam in redditione judicii quam in adjudicatione executionis*, is a writ of error brought by bail (after *scire facias* against them, and award of execution thereon) of the judgment against them, and the execution awarded thereupon; for they cannot have error of the principal judgment. Cro. Car. 481. 2 Leon. 101. Cro. Car. 561.

Nor can the bail join with the principal in error. Palm. 567.

When it lies.

This writ of error recites the judgment against the principal, but alleges the error in the second judgment, and in the execution thereof to the damage of the bail.

For error in *fact* the bail are relievable by *audita querela*. Yelv. 155. and now by motion.

Bail brought a writ of error *tam in redditione judicii in the original action, quam in adjudicatione executionis*. And it was quashed, because bail cannot have error on the principal judgment. Carth. 447.

After an award of execution against bail, on a recognizance in error, they brought a writ of error, as to such award of execution: the plaintiff moved for leave to take out execution for want of bail on the writ of error

error brought by the bail, and obtained a rule to shew cause; which was afterwards discharged, no bail in this case being required. Barnes, 194.

This writ lies on a judgment for plaintiff in B. R. afterwards affirmed in the Exchequer Chamber, and an award of execution in B. R. on a *scire facias* brought by plaintiff against defendant's bail.

The defendant cannot have this writ returnable in the Exchequer Chamber. Sal. 263.

How returnable.

This writ is taken out, allowed and proceeded on as on the writ of error *coram nobis*.

How proceeded on.

SECTION VIII.

Of proceeding in Error by Plaintiff to reverse his own Judgment.

If a plaintiff having obtained judgment below, brings a writ of error to reverse his own judgment (which is nothing strange or unreasonable where it is given for a less sum than he has a right to demand), the common method of bringing a *scire facias quare executionem non* would be improper, so would his suing out a *scire facias ad audiendum errores*. Therefore if such plaintiff in error will not proceed after his writ of error brought, the court of B. R. may and ought to make a rule to oblige him to assign errors within a limited time; which rule the court will make upon the plaintiff in error, to assign errors within *four days*, or else that his writ of error shall be *nonprossed*. *Johnson v. Jebb*, Burr. Rep. 4 p. 1772.

SECTION IX.

- A. Of Summons and Severance in Error.
- B. Of Quashing Writs of Error.
- C. Of Abatement of Writ of Error.
- D. Of amending Judgments after Error brought.
- E. Of amending Writs of Error.

3. A. Of Summons and Severance in Error.

Who must join
in error.

It is a certain rule, that all the parties to the suit below must in all cases of error be made parties also in the writ of error; and in case of the death of a party he must be named, and his death alleged in the writ. *Brewer v. Turner*, Str. 233. *Cooper v. Ginger*, Str. 606.

If therefore there is a joint judgment against two, and the writ is laid *ad damnum* of one of them only, it will be quashed on motion.

How if some
refuse.

Of summons
and severance.

If one therefore brings error, he must do it in the name of all; and if afterwards any of the others refuse to appear, upon the *scire facias quare*, &c. or to assign errors upon the rule given for that purpose, summons and severance lies; and the court will grant the other plaintiff in error time till such summons and severance can be effected. Mod. C. 40. Yelv. 4.

Time allowed
for that pur-
pose.

After a *scire facias* taken out and *scire faci* returned, one of the plaintiffs in error moved for time to assign errors till there could be a summons and severance of the other, upon an affidavit that the other executor was in the interest of the defendant in error, and would not join; and time was given accordingly. *Frescobaldi v. Kingston*, Str. 783.

Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable to join. Palm. 151.

But

But although there is this strictness in all the parties who should be plaintiffs in error joining, yet it does not seem to hold with respect to the defendants in error; for where one defendant in error only appeared, and sued out the *scire facias quare*, and plaintiff assigned errors, it was deemed a waiver of the objection that the other should have joined; and it was said, that the reason why plaintiffs should join, did not apply to defendants, viz. the inconvenience that would arise by a perpetual delay of execution if every defendant might bring a writ of error by himself. *Knox v. Costello*, Burr. 1789.

Whether defendants in error must afterwards all join in proceeding.

A writ of error was quashed because all the proper parties were not plaintiffs. *Ld. Raym.* 71.

Consequence of parties not joining.

But if the defendant in error proceeds without quashing the writ, and judgment is affirmed, he can only sue out execution against the one who was party to the writ; nor can he do that if the error be in Exchequer Chamber till the *remittitur* is sent into B. R. 2 D. & E. 737. *Laroche v. Wabrough* and another.

B. Of Quashing Writs of Error.

B.

If one brings error without the other, who ought to join with him, though the writ shall be quashed, yet the record shall be removed by it. *Ld. Raym.* 1403. Such writ cannot be amended; *Ld. Raym.* 1532. and in this case said, that the record is not removed by such bad writ of error.

Of quashing writs of error;

Several judgments were against three executors, two of whom only joined in bringing error, and bad. *1 Will.* 88. for what;

No person can bring error to reverse a judgment, who was not a party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal. *Roll. Abr.* 747. *Dy.* 90.

So error does not lie against any but him who was party or privy to the first judgment, his heirs, executors, or administrators. *Roll. Abr.* 747. 9 *Hen.* 6. 46, &c.

A writ

quashed as to
part.

A writ of error *tam quam* may be quashed as to one judgment, and stand good as to another, if it should be brought for error in the principal judgment, as well as for error in *adjudicatione executionis*, which is wrong. Ld. Raym. 328.

A writ of error of a judgment on a recognizance was quashed, because it was in *adjudicatione executionis judicii*. Ld. Raym. 553. for it ought to have been in *adjudicatione executionis super recognitionem*.

For variance.

So quashed for variance in the stile of the court. Ld. Raym. 704.

At what time
to be quashed.

A writ of error cannot be quashed till the transcript is returned and filed. Ld. Raym. 329.

In what court.

A writ of error on a judgment in B. R. returnable in the Exchequer Chamber, cannot be quashed in B. R. Dougl. 336. but only by that court into which it is returnable.

Not because
brought too
late.

The court will not quash a writ of error on motion, though it appears to be brought *twenty-nine years* after the judgment, and the statute restrains the party to *twenty years*; because if they did, it would deprive the plaintiff in error of the benefit of replying to the exceptions in the statute. *Higgs v. Evans*, Stra. 837.

Costs in such
case.

Costs upon quashing writs of error are to be given in all cases. Stra. 606.

C.

C. Abatement of Writ of Error.

Of defendants
quashing their
own *scire facias*,
writ having
abated by mar-
riage.

Error of a judgment in C. B. in an action there by a *feme sole*. To the *scire facias quare executio non*, the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment, and before the issuing of the *scire facias*; on which defendants in error moved to quash their own *scire facias*, and the other side insisted upon costs. *Per Cur.* It is the same in a *scire facias* as in an action, where you plead in abatement, and plaintiff's writ is abated, he pays no costs. Had there been no plea in abatement, and the party had moved to quash his own writ, we should have made

Of abatement
of writ.

Sec. I.

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made him pay costs. The writ was quashed without costs. *Pocklington v. Peck*, Stra. 638.

If the plaintiff in error dies before errors assigned, the writ abates, and the defendant in error may sue out a *scire facias* to revive the judgment against his executor, &c. But if he die after errors assigned, and a joinder in error, it does not abate the writ, and the defendant in error may proceed to get the judgment affirmed, but must then revive it against the executor, &c. of the plaintiff in error. By death of plaintiff.

After the record removed from C. B. into B. R. by writ of error, defendant died, and the plaintiff moved in C. B. for leave to take out a *scire facias* against defendant's executors. But on shewing cause, the rule was discharged. The record being removed out of C. B. the motion was improper in that court. Barnes, 206.

A writ of error does not abate by the death of the defendant in error. *Ld. Raym.* 439. *Salk.* 246. but otherwise if the plaintiff die. *Sir H. Thynne v. Corie*, 1 Vent. 34. A *scire facias ad aud. errores* went against the executor, when the defendant in error died. Barnes, 432. By death of defendant not.

If there are several plaintiffs in one writ of error, the death of one abates the writ of error, because there cannot be any judgment according to the writ; but if there are several defendants in error, and one dies, it is otherwise, for they are not named in the writ. *Ld. Raym.* 244. By death of some of the parties.

So a writ of error does not abate by the death of the defendant, in error after *in nullo est erratum* pleaded. *Ld. Raym.* 1295. When death must happen.

If a writ of error abates by the act of the party, execution shall go. *Stra.* 1025. as where a writ of error brought by a *feme sole* abated by her marriage; and then she and her husband brought a second writ; the court gave leave to take out execution, it being a delay by the act of the plaintiff in error. Consequence of writ abating.

Entry of *disseisee*, pending a writ of error, abates it. *Ld. Raym.* 476. An abateable writ is abated as to a stranger. *Ibid.*

Where

Where a writ of error abates by motion, the court must be moved to take out execution; but otherwise if for *variance*. Salk. 264. But now if the writ varies from the record, &c. it is amendable by 5 Geo. 1. c. 13.

Of second writ
in such case.

If a writ of error abates or discontinues by the act and default of the party, a second writ shall be no *superfedeas*. Keb. 658. As if plaintiff in error be nonsuit, he shall not have a writ of error again. Salk. 263. pl. 4. Ld. Raym. 91.

How a super-
fedeas.

But if a writ of error abates by the act of God, or the law, a second writ of error will be a *superfedeas*. As where a writ of error abated by the death of the lord chief justice Foster, and a second writ of error was sued out and allowed, and it was held a *superfedeas*. Keb. 658. So a second writ is a *superfedeas* upon abatement of the first writ of error by death.

D.

D. Of amending the Judgment after Error brought.

Postea.

The *postea* may be amended by the judges notes at any time, even after final judgment, and writ of error brought. *Doe dem. Church v. Perkins*, 3 D. & E. 749.

Verdict as to
entering a re-
mittur.

Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the court will permit the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. *Pickwood v. Wright*, 1 C. B. T.R. 643.

Verdict by
judges notes.

Defendant pleaded the general issue, and the statute of limitations, a verdict was found for the plaintiff on the first issue, and no notice taken of the last; after error brought and joinder in error (which was assigned on this point) the court allowed it to be amended by the judges notes, on payment of costs. *Petrie v. Hannay*, 3 D. & E. 659.

Judgment in
replevin.

Where the defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and

and damages to the amount of the rent claimed in his cognizance, *without finding either the amount of the arrear or the value of the cattle distrained*, and judgment was entered for the damages assessed, the court permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo* after a writ of error brought. *Rees v. Morgan*, 3 D. & E. 349.

If error is assigned on a mistake in form, the mistake may be amended in the court below, pending the writ of error. *Richards v. Brown*, Doug. 116. A mistake in form on which error is assigned.

And this in a penal action. *Ibid.*

A judgment may be amended by changing it from "*de bonis propriis*" to *de bonis testatoris si, &c.*" after error brought. *Richards v. Brown*, Doug. 116. *Short v. Coffin*, Burr. 2730. Judgment against executor.

So, if the judgment do not say that the damages *ac- cione detentionis debiti* were awarded *ex assensu suo*, it may be amended though that has been assigned for error. *Ibid.* Judgment in debt.

The name of the attorney in the plaintiff's warrant may be altered so as to make it correspond with that in his declaration, after error brought, and the variance between the warrant and declaration assigned for error. *Richards v. Brown*, Dougl. 116. Name of attorney in warrant.

So a mistake in the addition in the warrant of attorney may be amended after error brought. *Ibid.* Addition in warrant.

So the surname of the attorney in the declaration may be amended, and made to correspond with that in the warrant after error brought. *Ibid.* Surname of attorney in declaration.

So the judgment may be amended by the paper-book, signed by the master. *Parsons v. Sill*, Salk. 51. Judgment amended by paper-book.

Amendments of the judgments have been made after writ of error; and a record transcribed; but transcript not carried into K. B. Bar. 18. Amendments after transcript;

And after *nullo est erratum* pleaded. Bar. 7. *Foster v. Blackwell*. after pleading in error;

And

after argument
and time al-
lowed for that
purpose.

And even after argument on error, court of K. B. postponed judgment, though they thought the judgment below not to be supported upon the importunity of defendant in error, to move the court of C. B. to amend the record by verdict, which was afterwards done. *Smith v. Fuller*, Str. 786.

Costs in such
case.

These amendments are generally allowed upon payment of costs, provided plaintiff does not further prosecute his writ of error, but if he proceeds, then without costs. Bar. 17.

¶

¶ Of amending Writs of Error.

A writ of error was not amendable at common law, nor by any of the statutes of amendments and jeofails, till the 5 Geo. 1. c. 13. for all amendments are granted for the support of judgments; but the principal design of writs of error is to reverse them. Ld. Raym. 71.

Stat. 5 Geo. 1.
c. 13.

But by the stat. 5 Geo. 1. c. 13. it is enacted, "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writ or writs of error shall be made returnable, &c."

What amend-
ments allowed.

A writ of error was returnable before any judgment given, and on consideration it was held to be such a fault as is not amendable by the 5 Geo. 1. Stra. 807.

How as to costs.

There was a variance between the writ of error and the record; and as it stood in the paper the court observed it; but neither party would move to amend it, for fear of paying costs. Upon which the court said the stat. 5 Geo. 1. c. 13. would warrant their amending it, which they did without costs. *Gardner v. Merratt*, 902. Ld. Raym. 1587.

Error was brought by B. to reverse a judgment given against him in C. P. after verdict in ejectment, wherein he was defendant. The writ was *tested* 23d of Oct. and returnable in eight days of St. Martin, in Mich. following. And by the record certified, the judgment appeared

peared not to be given till Hilary following. Whereupon it was clearly held, that the record was not removed by this writ of error. Then it was moved, that the writ of error might be amended by the 5 Geo. 1. c. 13. ; but upon reading the statute, the court were of opinion it could not be done ; for it would be to amend the writ, contrary to the truth of the case, as the judgment, in fact, was not given till Hilary term ; and therefore, this was not such a *variance* as was intended to be amended by that act. *Ld. Raym. 1531. Stra. 807.*

After error in *Cam. Scacc.* from B. R. the transcript was brought back and amended in B. R. by the original record there ; and it was held necessary to make the amendment in B. R. because this differs from the case of a writ of error from C. B. into B. R. for C. B. sends up the very record, whereas B. R. only sends the transcript. *Rutter v. Redstone, Stra. 837.*

In what court to be amended.

Judgment was against two, one only brought error, the writ was never moved to be quashed, but defendant in error went on, and judgment was affirmed in *Cam. Scacc.* and costs given, and *both* defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered ; the court of K. B. permitted the plaintiff to amend his writ of execution as to the defendant who did not join, by altering it to the original sum recovered. *Laroche v. Wasbrough* and another, 2 D. & E. 737.

Of amending writ of execution upon error.

If a writ of error is amended in B. R. new bail shall be given to the amended writ in C. B. and the plaintiff below shall not take out execution for want of bail. 2 Blackf. Rep. 1067.

New bail on amended writ.

No costs are to be paid on any amendment of writs of error, pursuant to this statute ; but if the writ of error be quashed, the defendant in error shall have *costs*. *Fitzgib. 201.*

Costs.

SECTION X.

Of False Judgment.

What it is.

A writ of *false judgment* lies where an erroneous judgment is given in any court not of record, in which the suitors are judges. F.N.B. 18. a.

Where it lies.

If there are no *suitors* by whom the plaint may be certified, there shall not be *false judgment*, as in a copyhold court; in which, upon an erroneous proceeding, the copyholder must sue to the lord by petition. F.N.B. 18. h.

A writ of false judgment upon a judgment in the sheriff's court, is in the nature of a *recordari*. F.N.B. 18. a. b.

And upon a judgment in another court, not of record, it is in the nature of an *accedas ad curiam*. *Ibid.*

By whom to be sued.

A writ of false judgment may be sued by any one against whom judgment is given, his heir, executor, or administrator.

Or by any one who has damages, though the other defendants do not join as they ought to do in *error*. R. Mod. 854.

A writ of *false judgment* issues as a *writ of error* out of Chancery, upon application to the proper *curfitor*.

How to sue it out and proceed on it.

Upon the return of the writ, and the whole record certified and not before, the plaintiff shall assign his errors. F.N.B. 18. i.

And he may have a *scire facias ad audiendum errores*, as in error. F.N.B. 18. f. g. Or now he may serve a rule as in cases of error.

Or, if the defendant has day by the roll, the plaintiff may assign errors without a *scire facias* against him.

The writ of *false judgment* ought to be served in court. 6 Hen. 7. 16. a.

And being served, shall be a *superfedeas* to all proceedings below. 6 Hen. 7. 15. b. operates as a *superfedeas*.

Upon *two sci. fa. ad aud. errores* awarded, and *nihil* returned, or *scire feci* and default made, the judgment shall be reversed.

If a writ of false judgment abates, or the plaintiff therein is nonsuited, the defendant shall have a *scire facias quare executionem non*. F. N. B. 18. g. Of its abating.

If upon false judgment brought, which ought to be served in court, and the lord refuses to hold his court, a *distingas tenere curiam* goes against him. 6 Hen. 7. 16. a.

When the parties are once in court, the subsequent proceedings in *false judgment* are the same as in error.

A writ of false judgment was delivered to the under-sheriff, but no money was tendered or paid for the return; for want whereof, the sheriff took no notice of it, and executed a writ *de executione judicii*. Upon hearing counsel on both sides, the sheriff's proceedings were held to be regular. *Per Cur.* The defendant, if he thinks fit, may proceed on his writ of false judgment. *Gale v. Hooker*, Bar. 199. Of the writ *de executione judicii*.

[For the form of this writ, and the return, &c. there- to, see *Appendix*.] [For form, see *Appendix*.]

C H A P. XXI.

Of Costs.

SEC. 1. *Of Plaintiff's Right to Costs.*

A. In what Cases he is entitled to them.

B. When no more Costs than Damages, and herein of the Statutes 43 Eliz. 21 Jac. 1. and 22 & 23 Car. 2.

C. Of Plaintiff's Costs against inferior Tradesmen, under 4 & 5 W. & M.

D. Of Plaintiff's Costs in Cases of Wilful Trespas, under 8 & 9 W. 3.

E. Of Plaintiff's Costs where the Action ought to have been brought in the Court of Requests, and herein of the Suggestion.

SEC. 2. *Of Defendant's Right to Costs.*

SEC. 3. *Of Costs where there are several Defendants and Verdict against some only, and where there is double Pleading, and some insufficient Pleas under the 4 & 5 Anne, or several Counts and Verdict only upon some, and where some Defendants let Judgment go by Default, and others go to Trial.*

SEC. 4. *Of Costs in Error, and of allowing Interest on the Judgment.*

SEC. 5. *Of staying Proceedings till Security for Costs is given, or until Costs of former Action are paid, and of deducting lesser Costs from the greater.*

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SECTION I.

Of Plaintiff's Right to Costs.

Q. In what Cases he is entitled to them.

3.

THERE was no such thing as costs *eo nomine* at common law, but they were generally included in the damages given by the jury. This however being discretionary, and often inadequate, the legislature thought proper to put the plaintiff's title to costs upon a surer basis; and in the reign of 6 Edw. 1. passed a statute, which is the first upon the subject, and generally known by the name of the Statute of Gloucester, whereby it was enacted, that "The demandant in assize of novel disseisin, in writs of *mort d'auncester, cofinage, aiel and besail*, shall have damages. And demandant shall have the costs of the writ purchased, together with the damages, and this act shall hold place in all cases where the party recovers damages, and every person shall render damages where land is recovered against him upon his own intrusion or his own act."

No costs at common law.

Of the statute of Gloucester.

Though the statute says costs of the writ, it has been construed to extend to costs of the suit generally. These costs, therefore, are the *expensa litis*, such as shall be allowed upon taxation of costs by the master or prothonotary, but plaintiff is not to be allowed money expended on account of himself, or for the loss of his own time.

Construction thereof.

By the statute of Gloucester, therefore, costs are given as well in those actions mentioned in it, as in all actions whatever, in which the plaintiff, before that statute, could recover damages; but if damages were not recoverable before, no costs are thereby given. So that if a subsequent act gives damages where none were recoverable before, no costs can be recovered unless costs are expressly given also.

To what actions it extends.

How as to subsequent statutes.

There are various instances of statutes subsequent to the above statute of Gloucester giving damages;

N n 2

but

but by not mentioning costs, the party is not entitled to them, amongst which are the following:

Action of waste. Statute of Gloucester, c. 5. which gives an action of waste with treble damages against tenant for life, years, or in dower. Stat. of Westm. 2. c. 5. giving damages in *quare impedit* and *darrein presentment*. 5 Edw. 6. c. 14. against engrossers, and 1 & 2 P. & M. c. 12. for driving a distress out of the hundred.

Scan. mag. So, no costs in an action for *scan. mag.* because action did not lie at common law, and the statute giving the action makes no mention of costs. 2 Show. 506.

Formedon. So, no costs in formedon or writ of right, because no damages are recoverable therein.

How, if damages before, recoverable. But where a certain sum is given by a subsequent statute, to a party injured in an action wherein damages were recoverable before the stat. of Gloucester, the plaintiff shall also have costs, though costs are not mentioned in such subsequent statute; as in an action by the party injured on the riot act, 1 Geo. 1. c. 5.; or on the black act, for setting fire to plaintiff's house, &c. 1 D. & E. 71.; and on statutes of hue and cry, costs are recoverable. 2 Wil. 92.

Action of debt for penalty. So, in an action of *debt* on any statute by a party grieved for a certain penalty, though such statute does not mention costs. 2 D. & E. 154. 1 H. Blac. 10.

Of double or treble damages. So, if double or treble damages are given by a statute in any case where at common law single damages were recoverable, but not otherwise, the costs shall be doubled or trebled, though no costs mentioned in the statute. Carth. 297. Pinfold's Case, 10 Co. 116.

When to be had. So, if statute gives treble damages and costs of suit, costs shall be trebled, Sal. 205. not only such costs as are given by the jury, but the costs adjudged *de incremento*, shall, be trebled. Str. 1048.

What they are. If plaintiff obtains judgment on a demurrer, he shall have costs, provided he would have been entitled to them

them on a verdict; because the demurrer is a confession of damages.

But no costs can be recovered in any action by a common informer or prosecutor *qui tam*, unless given by the statute. No costs in *qui tam* actions.

In actions sounding in *damages*, the jury cannot regularly give plaintiff more than he counted for; yet if the jury would give him full damages, they may award him *costs* distinct and separate from the *damages*. And though such costs exceed the damages laid in the declaration, yet the plaintiff shall have both. For in such case the *damages* are given for the wrong, for which the action is brought, and the *costs* for the charge of the suit. Jury may find costs beyond damages.

B. In what Cases Plaintiff shall have no more Costs than Damages.

B.

As by the statute of Gloucester, costs were recoverable in all cases indiscriminately where damages were recovered, however small the *quantum* of such damages, suitors were naturally encouraged to forsake the inferior courts, and to bring their causes into Westminster-Hall, trifling as the nature of the demand might be, which at length became very expensive and oppressive to defendants. The legislature, therefore, to prevent this abuse, and to confine actions of small value to the courts below, by the 43 Eliz. c. 6. enacted, that "if upon any *personal action*, not being for any title or interest of land, nor concerning the freehold or inheritance of lands, nor for any *battery*, it shall be certified by the judge before whom tried, that the debt or damages recovered shall not amount to forty shillings or above, the plaintiff shall have *no more costs* than the *debt* or *damages* recovered." Inconvenience of stat. of Gloucester.

How remedied.

B. 1.
Stat. 43 Eliz.

By personal actions, the statute means such actions as debt, assumpsit, assault, trespass *de bonis*, and all other the like actions, where the title or interest of land might not come in question, though *collaterally*, or where it is not for any battery of plaintiff's person; for Construction thereof.

it extends to trespass for beating plaintiff's dog, or the like. 3 D. & E. 37.

Certificate required.

But it is to be observed, that it is not the mere finding by the jury of damages under 40*s.* which deprives the plaintiff of his costs, unless the judge thinks proper to certify.

When to be granted.

The certificate may be granted after the trial. Say. Costs, 18.

Formerly refused;
of late granted

Formerly the judges almost uniformly persisted in refusing to certify in such cases; but latterly there have been several instances of its being done. *Dand v. Sexton*, 3 D. & E. 37.

Notwithstanding a justification.

And such certificate may be given notwithstanding defendant may plead a justification. Say. 260.

B. 2.

B. 2. In Cases of Slander, under 21 Jac. 1. c. 16.

It seems then by the above statute of Elizabeth, that the judge, by his certificate, *deprives* plaintiff of his costs.

21 Jac. 1.

The next statute upon the subject is the 21 Jac. 1. c. 16. s. 6. This depends not upon any certificate, but upon the mere verdict of a jury; for it is enacted, that
“in actions for slanderous words, if damages are given
“ (that is, either by a jury at trial, or on a writ of inquiry, for it extends to both cases) *under forty shillings*,
“ plaintiff shall have no more costs than damages.”

What cases of slander it extends to;

This statute means only words in themselves actionable without *special damages*. Therefore, for words not actionable in themselves, but only actionable by reason of *special damage*, the plaintiff, though he recovers damages under *forty shillings*, shall nevertheless have *full costs*. But for words in themselves actionable, although plaintiff lays *special damages*, if the jury gives him less damages than *forty shillings*, he shall have no more costs than damages. 2 Blac. 1062.

though defendant justifies.

Even if defendant pleads *double*, and justifies, and there be a general verdict against him, it seems, if plaintiff

plaintiff recovers less than *forty shillings*, he shall have no more costs than damages under this act, if the words in themselves were actionable. 2 Wil. 258. Bar. 128.

Slander of title, is neither within the words nor the meaning of this act; the *special* damage being in such case the gift of the action. Cro. Car. 141. Slander of title not within the act;

Action for a *libel* is not within it, and plaintiff shall have his costs, though the damages given are under 40 s. nor a libel.

But the statute of James only precludes the court from giving more damages; but a jury may assess what costs they please, though they give damages under 40 s. Salk. 207. Jury may give costs.

B. 3. In Cases of Trespafs, under 22 & 23 Car. 2.

B. 3.

The next statute on this subject is the 22 & 23 Car. 2. c. 9.; and as by the stat. of 43 Eliz. if the judge certifies where the damages are under 40 s. plaintiff can have no more costs than damages: so, by the statute of Charles, if the damages be under 40 s. plaintiff shall have no more costs if the judge does not certify. Difference between stat. of Eliz. & Car.

For that statute enacts, that "in all actions of *trespass, assault and battery*, and other *personal actions*, wherein the judge at the trial shall not certify under his hand upon the back of the record, that an *assault and battery* was sufficiently proved by the plaintiff against the defendant, or that the *freehold or title of the land mentioned in plaintiff's declaration* was chiefly in question, the plaintiff in such action, if the jury find damages under *forty shillings*, shall not recover more costs than the damages found; and if more costs shall be awarded, the judgment shall be void, and defendant acquitted from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such his suit. *"

22 & 23 Car. 2.

This statute, notwithstanding the words "*other personal actions*," extends only to actions of *trespass quare* extends only to actions of trespass;

* This statute, and all statutes preceding it, for prevention of frivolous and vexatious suits in the superior courts, are extended to the courts of great sessions in Wales, and courts of the counties palatine, by 11 & 12 W. 3. c. 9.

clausum fregit, and *assault and battery*; because the intention was not to prevent a plaintiff from recovering full costs in any action, except such wherein it was possible for the judge to certify that an *assault and battery* were sufficiently proved, or that the *freehold or title* of the land was chiefly in question; which *certificate* can be but in those actions.

but not if judgment by default;

On a writ of inquiry on this statute, if damages under forty shillings are given by the inquest, the plaintiff shall have full costs, because this statute is confined to the case of damages found by the jury at the trial; and does not, like the statute 2 Jac. 1. c. 16. extend to both cases.

nor to causes removed from inferior courts.

After removal of a cause from an inferior court by defendant, if damages are given under forty shillings, though the judge do not certify, plaintiff shall have full costs. But not if the cause be removed by the plaintiff, for if so it might make him vexatious.

Jury may give more costs.

This statute only prevents the court (without a certificate from the judge), but not the jury at the trial, from giving more costs than damages, if under forty shillings; therefore the jury may find costs to more than forty shillings, though they find damages under that sum.

Certificate must be granted at trial.

The certificate, to entitle plaintiff to full costs upon this statute, must be granted at the trial; and must be, that an *assault and battery*, or that the *freehold*, or title of the land mentioned, was chiefly in question.

In what actions of trespass judge can certify, and what not.

So that, where the judge cannot certify that an *assault and battery* was proved, or that the *freehold or title* was chiefly in question, the plaintiff shall recover his full costs, notwithstanding damages under forty shillings, without a certificate; as in *debt*, *assumpsit*, *trover*, *trespass for taking his horse, bull, or sheep*; or for cutting or breaking his net; or for taking his goods; *trespass for spoiling his goods*; *trespass for beating his servant*, per quod, &c.; or for breaking his close, and impounding his cattle (if defendant is found guilty of the impounding); or for breaking his close, and cutting and taking away his corn (if defendant is found guilty of cutting and taking the corn*).

* But if the defendant is acquitted of cutting and taking away the corn, or of impounding the cattle, then the case is within the statute of Car. 2. and without a certificate plaintiff will not have full costs.

But

But in *trespass* for breaking his close, and digging therein; or for entering his house and breaking the door; or for fixing stakes on his ground; or entering his close, and throwing down fences and pales; or for entering and building a wall on his close; or upon issue of *extra viam* to justification of right of way; if damages are given under forty shillings, plaintiff shall not have his full costs without a certificate from the judge at the trial; because in all such cases, the freehold or title to the land or house, mentioned in the declaration, is in question.

In all cases however, if it appears upon the pleadings that the freehold or title was in question, there needs no certificate to entitle the plaintiff to full costs, though the damages are under forty shillings; because the certificate could say no more than what appears on the record. As in *assault* and *battery*, if defendant justifies, for then he admits the *battery*. So, if plaintiff declares on a *clausum fregit* in one count, and for an injury to a chattel, or for taking his hog, or for an *asportation* in another count, and there be a general verdict, and damages under forty shillings, he shall have full costs without a certificate; because, upon the second count, it was not in the judge's power to certify. So, if *trespass* on land and an *asportation* be charged in one count, and there be a general verdict and damages under forty shillings. So, if a *trespass* on land, and chasing his cattle, be charged. So, if it be for breaking and entering his free warren, and killing and chasing his hares, conies, &c. But in *trespass* for breaking and entering a house, breaking window-shutters, and spoiling the bolts thereto; or for breaking and entering a house, making a noise, continuing there, &c.; or, for breaking close, cutting down, topping, and spoiling trees; or breaking close, treading down, digging and taking away sods, earth, &c. for here what is called an *asportation* is a mode, a qualification of the injury done to the land. Or, for *trespass* in his close with cattle, and spoiling the fruit there found; or, for breaking and entering a house, keeping plaintiff out of possession with a *per quod*; or, for breaking and locking up a house, detaining goods therein; or, for only breaking the windows of plaintiff's house; or, for *assault* and *battery*, throwing him down and thereby spoiling his clothes; in all these and the like cases, if a general verdict and damages under forty shillings are given,

In what cases
no certificate
necessary.

given, there shall be no more *costs* than *damages*, without a *certificate*. See a variety of cases, and the law fully discussed hereon in Hullock's Law of Costs, ch. 1.

C. Of Plaintiff's Costs in Actions against inferior Tradesmen, &c.

The next statute relating to plaintiff's costs, is the 4 & 5 W. & M. c. 2. s. 10. which to a certain extent repeals the stat. 22 & 23 Car. by giving plaintiff his full costs, however trifling the damages, where an action is brought against any person of the description mentioned therein for the offence therein described.

4 & 5 W. & M.
as to suits
against inferior
tradesmen.

"Whereas great mischiefs do ensue by *inferior* tradesmen, apprentices, and other dissolute persons, neglecting their trades and employments, who follow hunting, fishing, and other game to the ruin of themselves and damage of others. It is enacted, that if any such person shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice, duly qualified by law), such person shall be subject to the penalties of this act, and may be sued and prosecuted for their wilful trespasss, in such their coming on others land; and if found guilty thereof, the plaintiff shall not only recover his damages there- by sustained, but his *full costs of suit*: any former law to the contrary notwithstanding."

Who are infe-
rior tradesmen
within the act.

Who is an inferior tradesman or not, has been often a matter of dispute; some judges holding it to be a mere point of law, and that all tradesmen not *qualified* to hunt, &c. should be deemed inferior tradesmen and *vice versa*; whilst other judges have held it to be a mixed question of law and fact, to be observed upon by the judge in summing up, and left to the jury to determine; and by no means to include every tradesman not qualified. 2 Will. 70.

How if that
part of the case
be not proved.

If in an action upon this statute, against defendant as a *dissolute person*, &c. if the plaintiff proves only the *trespass*, but not the circumstances under the statute, and has a verdict, he shall recover as in common actions of *trespass*, viz. *no more costs than damages*, if the da-

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damages are under 40 *shillings*: for not proving the special circumstances, the action is then no other than a common action of trespass.

D. Of Plaintiff's Costs in Cases of wilful Trespas.

D.

The statute 22 & 23 Car 2. above mentioned, being construed so strictly by the courts, that in *trespass quare clausum fregit* the judges could not certify, unless the freehold or title were in question; plaintiffs were frequently deprived of costs if they recovered but small damages, when the *trespass* they complained of was wilful and maliciously committed. To remedy this, it was enacted, by 8 & 9 W. 3. c. 11. sec. 4. "in all actions of *trespass* in any of his majesty's courts of record at *Westminster*, wherein, at the trial of the cause, it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty was *wilful and malicious*, the plaintiff shall recover, not only his damages, but *his full costs of suit*, any former law to the contrary notwithstanding."

Of 8 & 9 W. 3.
as to wilful trespasses.

Every *trespass* is *wilful*, within the meaning of this act, where the defendant has notice, and is especially forewarned, not to come on the land; as every *trespass* is *malicious*, though the damages may not amount to forty *shillings*, where the intent of the defendant plainly appears to have been to harass, vex, and distress the plaintiff: so that every *trespass*, that is ill-naturedly committed or done, after notice, is a *malicious trespass*.
1 D. & E. 636.

What shall be
deemed a wilful
trespass within
the act.

The certificate on this statute must be made by the judge in court at the trial, otherwise it is void.
2 Will. 21.

When certificate must be made.

E. Of Plaintiff's Costs where the Action ought to have been in a Court of Conscience.

E.

To discourage plaintiffs from suing in the superior courts for trifling matters, after reciting an act for the establishment

Of the 3 Jac. 1.
c. 15. court of
requests in
London.

establishment of the court of requests in the city of London, for the recovery of small debts, it was enacted, by 3 Jac. 1. c. 15. sec. 4. "That if any action of debt, or upon the case upon an *assumpsit*, for the recovery of any debt, prosecuted against any of the persons * afore-
said, in any of the king's courts at Westminster, or else-
where, out of the said court of requests, it shall appear to the judge or judges that the debt to be recovered doth not amount to the sum of *forty shillings*, and the defendant in such action shall duly prove, either by sufficient testimony, or by his own oath, to be allowed by any the judge or judges of the said court where the action shall depend, that at the time of commencing such action, defendant was inhabiting and resident in the city of London, or liberties thereof; the said judge or judges shall not allow to the said plaintiff any costs of suit, but shall award the plaintiff to pay so much ordinary costs to the defendant as he shall prove, before the said judge or judges, it hath truly cost him in defence of the said suit."

Defendant may plead it, or take advantage by suggestion; but no suggestion after default.

If the defendant does not plead the statute in bar of the action in the *superior court*, but suffers a verdict to go against him, he may take advantage of such statute by entering a *suggestion on the roll*.—But if he lets judgment go by *default*, he precludes himself from taking any advantage of the statute, and cannot make a *suggestion on the roll* to have his costs; for when an inquest is taken by *default*, the defendant is out of court to all purposes but having judgment against him.

To what cases statute does not extend;

Notwithstanding plaintiff declares for more than *forty shillings*, yet if the jury give a verdict for less than *forty shillings*, being the real debt or demand at the commencement of the action, the defendant (if a person within the act) may make his *suggestion on the roll* to have his costs, and the costs of the suggestion shall also be included. But if the original debt was above *forty shillings* at the commencement of the suit, and defendant pleads, or gives in evidence a *set-off*, and plaintiff has a verdict

set-off;

* That is, persons inhabiting within the said city, being *tradesmen, victuallers, or labouring men*; but the statute 14 Geo. 2 c. 10. extends this act to all persons renting or keeping shop, shed, stall, stand, or seeking a livelihood in the city or liberties; which *vide*, as also the statute of James, and the exceptions in that act.

for the balance under *forty shillings*, the defendant can make no *suggestion*.—Otherwise, if defendant gives in evidence, payment before action commenced, which reduced the debt under *forty shillings*, at the time it was commenced; so no suggestion if tender pleaded.

tender.

If defendant would take advantage of such statute, it must be by motion for leave to enter a *suggestion on the roll*, which motion must be made on an *affidavit* of the fact on the part of the defendant.

How to move for suggestion.

When the *suggestion* is entered with leave, the method is to grant a rule; and unless plaintiff pleads thereto within the time limited, or demurs, the allegation of defendant in his suggestion is taken *pro confesso*, and the officer will allow the costs, whether *single, double, or treble*, as the statute directs.

These statutes do not extend to cases where *executors* are defendants or attornies, or to defendants where an attorney is plaintiff.

To what persons statute does not extend.

Since the making of this statute, *courts of requests or conscience* have been established in various places, as in Westminster, Southwark, Bristol, Gloucester, &c. and some statutes give *double costs* to the defendant, if sued in a superior court for a debt *under forty shillings*.

Besides it is necessary to refer to the particular statutes as they differ in the mode of taking advantage of the objection.

Thus by the stat. 23 Geo. 2. c. 27. whereby a court of requests is established for the city and liberty of Westminster, and that part of the duchy of Lancaster adjoining thereto, the defendant if not liable to be sued in the court above, ought either to *plead* the statute as therein directed (p. 8.), or at least to make the objection at the *trial* to nonsuit plaintiff; for after verdict he cannot take advantage of it by suggestion as in other cases. 3 D. & E. 452.

Of 23 Geo. 2. court of requests in Westminster;

defendant must plead the fact;

no suggestion.

SECTION II.

In what Cases Defendant may have Costs.

3.

A. After Nonfuit or Verdict.

Of the statute
Marlbridge.Of the 23 Hen.
2.

Of the 4 Jac. ;

Until the 23d year of the reign of Hen. 8. a defendant was not entitled to costs in any case, except in a writ of right of ward maliciously brought, which costs were given by the statute of Marlbridge ; and even from the time of Hen. 8. to the reign of James I. a defendant was only entitled to costs in certain actions ; but by the 4 Jac. 1. c. 3. "costs are allowed to defendants in "all actions whatever in which the plaintiff if he re- "covered would be entitled to costs, and this either "after nonfuit or verdict."

In all cases, therefore, the only question is, whether the plaintiff if he had had judgment would have been entitled to costs ?

construction
thereof ;

And this whether the verdict be general or special, Cro. Eliz. 465.

Or, whether on the face of the declaration plaintiff shews a good cause of action or not, which used formerly to be doubted.

extends only to
nonfuit or ver-
dict.

So it extends to a nonsuit upon a second trial after a special case reserved on the first ; but upon coming on for argument, the facts not appearing properly stated, it was recommended and agreed to go to trial again, when plaintiff was nonsuited, and defendant had all his costs. Str. 300.

B.

B. After Discontinuance, *Nonpross*, and *Demurrer*.

The foregoing statutes extend only to the cases of *nonfuit or verdict* ; but to prevent malicious attachments and arrests by *latitat*, *alias*, and *pluries copias* in the King's

King's Bench, and by process in the Marshalsea court, and other inferior courts, it was enacted, by 8 Eliz. c. 2.

sec. 2. "That as often as any person shall sue, or cause or procure to be sued forth, any of the writs or process before mentioned, against any person, by which such person is arrested, or to which he shall appear upon the return, and put in bail, that then, if the party suing do not within three days after such bail taken, put into the same court his declaration, or if after declaration had and put in, the plaintiff shall not prosecute the same with effect, but shall willingly delay or *discontinue* his suit, or become *non-suit* thereon, the judges shall award defendant his *costs*, &c.

8 Eliz. c. 2.
costs of non-
pross, or dis-
continuance in
B. R.

If the plaintiff enter a *vol. prof.* defendant has costs on this statute. 3 D & E. 511.

There are like clauses for the *inferior* courts therein mentioned, but the court of Common Pleas is not within it.

But by 13 Car. 2. stat. 2. c. 2. it is enacted, that, "unless plaintiff, who has sued process out of the King's Bench and Common Pleas, shall put in his declaration against defendant in *personal actions* and *ejectment*, before the end of the term next after appearance, a *non-suit* may be entered, and defendant shall have *costs*, to be levied as provided by the stat. 23 Hen. 8."

13 Car. 2. st. 2.
costs of non-
pross only
in C. B.

This statute however does not extend the provision in the 8 of Eliz. above mentioned, in case of a *discontinuance* in the King's Bench to the court of Common Pleas; and the reason for the omission seems to be, that in the Common Pleas a plaintiff could not *discontinue* without leave; in granting which, the court always annexed the condition of *paying costs*.

The statutes before mentioned only give a defendant his *costs* upon plaintiff's *discontinuance*, *not declaring in time*, upon being *non-suited*, and upon a *verdict* against him.

It was afterwards extended to judgments on demurrer; for by 8 & 9 W. 3. c. 11. it was enacted, "if any

Costs on de-
murrer,
8 & 9 W. 3.
c. 11.

"any one shall commence or prosecute an action in
 "any court of record, wherein upon any *demurrer*,
 "either by plaintiff or defendant, demandant or tenant,
 "judgment shall be given against such plaintiff or de-
 "mandant, the defendant or tenant shall have judg-
 "ment to recover his *costs*, and have execution for the
 "same by *ca. sa. fi. fa.* or *elegit*."

To what cases
 it extends.

This statute only gives costs to defendant if judgment upon demurrer is given for him when the *demurrer* is to the merits, and not when the *demurrer* is to a plea in *abatement*; for if on a *demurrer* to a plea in *abatement* the plaintiff has judgment *quod respondeat ouster*, the plaintiff is not entitled to costs; and if on such *demurrer* the defendant has judgment, either *quod breve* or *billa casseter*, or *quod querens nil capiat*, he is not entitled to costs.

And it only gives costs on demurrer in such actions wherein the plaintiff would have had costs if he had obtained a verdict therein. Therefore no costs are recoverable within this act in *formedon* or in *quare impedit*.
 1 H. Blac. 530.

SECTION III.

A. Of Costs where there are several Defendants, and Verdict, against some only.

B. Of Costs of double pleading and insufficient Pleas.

C. Of Costs where Verdict on some of the Counts only.

D. Of Costs where some Defendants let Judgment go by Default, and others go to Trial.

3. A. Of Costs where several Defendants, and Verdict against some.

The above statutes only noticed defendants where all obtained the verdict, and did not provide for the case of some defendants being acquitted, and others found guilty;

guilty; in which case, at common law, the *acquitted* defendant was not entitled to costs. Therefore by the 8 & 9 W. 3. c. 11. sec. 1. it is enacted, that, "where several persons shall be made *defendants* in 8 & 9 W. 3. *trespass, assault, false imprisonment, or ejectment*, and c. 11. s. 1. "any one or more shall, upon trial thereof, be acquitted "by *verdict*, he or they shall recover his *costs* of suit, "unless the *judge* before whom the cause shall be tried, "shall immediately after the trial, in open court, *certify* "upon the record, that there was a reasonable cause "for making him or them defendant or defendants."

From the words of this statute, it extends only to *trespass vi et armis and ejectment*, not to *trespass on the case, or replevin*; for every statute giving *costs* is to be construed strictly, costs being in nature of a penalty. To what cases it extends.

Str. 1005. 3 Burr. 1284. 1 Blac. 355.

Nor to an action of trover. 3 Burr. 1285.

B. Of Costs of double pleading and insufficient Pleas.

25.

At the time the several statutes above mentioned were passed, a defendant could only plead one plea or justification, and was obliged to rely upon that for his defence, although he might have had other matters to allege in bar of plaintiff's action; the legislature therefore remedied this evil by an act of parliament of the 4 and 5 Anne, whereby a defendant is allowed to plead double; at the same time, by way of preventing unnecessary expence by useless pleas, they also made a provision respecting the costs. By the 4 and 5 Anne, introduced by c. 16. sec. 4. it is enacted, that, "a defendant or tenant in any action, or any plaintiff in *replevin*, may, "with leave of the court, plead as many several matters as he shall think necessary for his defence; provided, that if any such matter shall, upon *demurrer* "joined, be adjudged insufficient, *costs* shall be given at "the discretion of the court; or if a *verdict* shall be "found upon any issue for plaintiff or demandant, costs "shall also be given in like manner; unless the judge "who tried the issue shall certify that the defendant or "tenant,

At common law no double pleading;

introduced by 4 & 5 Anne.

"tenant, or plaintiff in *replevin*. had probable cause to
 "plead such matter upon which the said issue shall be
 "found against him."

Construction
 thereof.

This statute does not extend to *qui tam* actions, so as to give defendant liberty to plead double in them; nor to plead double in any case against the crown: nor does it extend to plead double matters which shall have different trials.

If the issue is found for plaintiff on a special plea, or there is judgment for him on a demurrer to such plea, he is to have costs by the express provision of this act, 4 & 5 Anne. But if on a demurrer to a special plea there is judgment for plaintiff, before trial on the general issue, and afterwards defendant has a verdict on the general issue, it seems the plaintiff shall not have those costs, because it appears ultimately that he had no cause of action.

Avowants
 within it.

An *avowant*, though not named in the act, is within the meaning of it; if, therefore, *one* or more issues be found for him, and there is no *certificate* that *plaintiff in replevin* had probable cause to plead such *double plea*, the avowant shall have costs of that issue which is found for him. So, avowant shall pay costs on the special avowries found against him. 2 D. & E. 235.

What costs in-
 tended thereby.

The costs intended by this statute are nothing more than the costs of those pleadings which have either been adjudged insufficient upon demurrer, or found by the verdict for the plaintiff; consequently the right to the general costs of the cause remains unaffected by this statute. Hullock, 106. 3 D. & E. 391.

How taxed and
 paid.

And whatever these costs are when taxed, they are deducted out of the greater costs.

The certificate upon this statute is not required to be made in court at the trial of the cause; and where the judge refuses to grant it, the court have not a discretionary power whether they will allow the defendant any costs at all, but are bound by the statute to allow him some costs, though the *quantum* is left to their discretion. Bar. 140. 2 D. & E. 394.

The

The intention of the legislature was, that if there be several matters pleaded, some of which are found for the plaintiff, he shall be entitled to the costs of those, notwithstanding other matters are found for the defendant, which entitle him to judgment upon the whole record, unless the judge before whom the cause was tried, shall certify that the defendant had a probable cause to plead the matters which are found against him. Tidd on Costs, 32. 2 D. & E. 391. 1 D. & E. 266.

§. Of Costs where Verdict on some of the Counts only.

¶

Where there are several counts in the declaration, and verdict upon one only, the courts differ in their practice as to costs, the Common Pleas allowing plaintiff his costs on the *whole* declaration; whereas in the King's Bench, neither party are allowed the costs of those counts, the issues upon which are found for the defendant. 2 Blac. 800. Say on Costs, 212.

Difference of practice in the two courts in that respect.

And in C. B. this rule holds not only where the cause of action is substantially the same in all the counts, and only varied in the mode of stating it; but even where the counts are for different and distinct causes of action. 2 Blac. 1199.

But in K. B. if there are two counts on *distinct* causes of action, and defendant suffers judgment by default on one, but pleads to the other, and on trial obtains a verdict, plaintiff shall be entitled to his costs on the first, and defendant shall have his costs taxed on the last, *Day v. Hanks*, 3 D. & E. 654.; and there must be two distinct judgments on the record. *Ibid.*

But if there are two counts, and defendant pleads not guilty to one, and a justification to the other, and on demurrer to justification, judgment is for defendant; but on trial of the issue, verdict for plaintiff, defendant shall have no costs. 2 Burr. 1232.

But where different issues are joined on different pleas, the defendant is allowed in the King's Bench his costs

costs on the issues found for him. Doug. 677, *Butcher v. Green*.

D. D. Of Costs where some Defendants let Judgment go by Default, and others go to Trial.

Costs depend on nature and extent of plea in this case.

If one defendant let judgment go by default, and the other justifies and obtains a verdict, the question of costs depends upon the nature and extent of the plea, and cause of action.

For, if the plea goes to the *whole* cause of action, and therefore shews that plaintiff had no just ground to prosecute, both defendants shall have costs. 1 Sid. 76. 1 Will. 89.

But if the plea only goes personally to discharge the defendant who pleads it, he only shall reap the benefit of it; and the defendant who suffered judgment by default shall pay costs. *Ibid.* 3 D. & E. 656. See also chap. 14. sec. 1. E.

SECTION IV.

Of Costs in Error, and of allowing Interest on the Judgment.

No costs at common law;

At common law there were no costs allowed on a writ of error.

first given by 3 Hen. 7 to defendants in error, who were plaintiffs below;

in what cases;

The first mention of *costs in error* is in the 3d of Henry 7. c. 10. when it was enacted, that "if any defendant or tenant, or any other bound by any judgment, before execution, sue any writ of error to reverse such judgment, in delay of execution; that then, *if the same judgment be affirmed*, or the writ of error *discontinued*, or party suing error be *non-suited*, the person against whom it is sued shall recover his *costs and damages*, for his delay and wrongful vexation, by discretion of the justices before whom the said writ of error is sued."

As

As there are no damages in a writ of *error*, but only a reversal or affirmance of the judgment, this statute was made to redress the mischief that arose from writs of error to delay execution.

This statute extends to writs of error given by subsequent statutes, as the writ of error in Exchequer Chamber given by 27 Eliz. c. 8. extends to subsequent statutes.

As a further discouragement to writs of error for the delaying of execution, especially after a *verdict*, double costs were given on such writs of error, provided the judgment was affirmed by 13 Car. 2. stat. 2. c. 2. where-
by it was enacted, that "if any person prosecute *error* for reversal of judgment *after a verdict* in any court of record at Westminster, counties palatine, or great sessions in Wales, and the said judgment be *affirmed*, such person shall pay to defendant in error *double costs*, to be assessed by the court, where such writ of error shall be depending *for the delay of execution*." Double costs after verdict;
by 13 Car. 2. stat. 2.

The above statutes give costs to *defendants in error* (the plaintiffs in the original action); but no costs are thereby given to defendants below, if the plaintiffs in the original action bring error. But to give such defendants relief it was enacted, by the 8 & 9 W. 3. c. 11.
"That if, after judgment given for the *defendant* in any action, the plaintiff or demandant shall sue any writ of error, and the said judgment shall be afterwards affirmed, or the writ of error be *discontinued*, or plaintiff shall be nonsuit therein, *the defendant or tenant* in every such writ shall have judgment to recover his costs against such plaintiff or demandant, and have execution for the same by *ca. fa. fi. fa.* or *elegit*." Costs given to defendant in error, who were defendants below;
by 8 and 9. W. 3. c. 11.

It is observable, that by the above statutes, costs are only given in case the judgment is *affirmed*; but if the court of error *reverse* the judgment of the court below, then there are no costs on the writ of error, but only the costs of the original action, the court above on such reversal only giving such judgment as the court below in the first instance ought to have done. 1 Str. 617. Statutes only extend to affirmance of judgment, not reversal;

and give costs though none in original action.

But if judgment be affirmed, costs are recoverable on error, notwithstanding costs were not recoverable in the original action. 3 Burr. 1511. Str. 1084.

How as to executors or administrators.

Executors or administrators bringing error are liable to costs when the judgment against them in the court below was as to the debt *de bonis testatoris*, and as to costs *de bonis testatoris & si non de bonis propriis*. 1 H. Blac. 566.

So, if it were an action charging them with a devastavit. Str. 1072.

Court of error must give double costs.

The court of error is bound to give double costs on the affirmance of a judgment on writ of error after verdict; and it is in their discretion to give damages also, which they sometimes do in the shape of interest; for which see *post*. *Shepherd v. Macreth*, 2 H. Blac. 284.

Statutes only extend to error before execution.

The above statutes of Hen. 7. and 13 Car. only give costs where the writ of error is *before* execution, or brought *for delay*. Whenever therefore error is brought *after* execution, and judgment is affirmed, no costs are allowed. Str. 1199.

And if execution be executed in part, costs shall be proportionably diminished. Cro. Car. 173.

Defendant further protected by bail in error;

In order to protect the defendant in error still further against any delay of execution, it was thought expedient not only that he should have his costs of the proceedings in error, but also should be secure in the recovery of his former judgment. It was therefore enacted, by 3 Jac. 1. c. 8. "That no execution shall be stayed upon error brought in certain cases (for which see chap. 20. tit. Error), unless plaintiff in error put in bail for double the sum recovered to prosecute the writ of error with effect; and also to satisfy and pay, if judgment be affirmed, the debt, damages, and costs adjudged upon the former judgment, and also all costs and damages to be awarded for delaying execution."

required by 3 Jac. 1. c. 8.

This

This statute therefore prescribes the terms on which a delay of execution may take place ; and by the latter words, evidently refers to the 3 Hen. 7. c. 10.

As new bail upon a different kind of recognizance must in such cases be given, the bail to the original action are not liable to pay the costs of error. *Yates v. Doughan*, 6 D. & E. 288.

Bail in original action not liable to costs in error.

As the above statutes only extended to the cases of *affirmance of the judgment, nonsuit, or discontinuance* ; it was enacted, for preventing vexation by defective writs of error, "That upon quashing of any writ of error for variance from the record, or other defect, the defendant shall recover, against the plaintiff issuing such writ, his costs as he should have had if judgment be affirmed." 4 & 5 Ann. c. 16. sec. 25.

Of costs on quashing writs of error.

4 & 5 Ann. c. 16.

Defendant in error shall be allowed the costs of his motion, as well as the other costs under the above statute, upon quashing a defective writ of error, *Ld. Ray*. 1403. though no costs might be recoverable in the original action. *Str.* 262. But not so if the defect of the writ was occasioned by his own acts, as by entering continuances on the judgment, or delaying the signing of the judgment till the writ of error is spent. *Str.* 139. 834.

Construction of statute.

We have hitherto considered the statutes on this subject so far as they relate to *costs* ; but it may be proper to shew what further recompence they afford the party delayed in their execution by way of *damages*.

Of interest on judgment when allowed in error.

It is observable, that the statute of Hen. 7. particularly mentions *costs and damages*, clearly shewing that the legislature intended something more than the mere costs. And indeed were it otherwise, it might often be advantageous to the party against whom judgment is obtained to delay execution by writ of error, even upon payment of the costs, inasmuch as if the amount of such judgment were considerable, the very interest of the money, by delay of payment, might exceed the costs on the writ of error ; for this reason, therefore, interest from the time of signing the judgment until the affirm-

How warranted by the statutes.

Justice thereof.

ance thereof, is now generally allowed, and added to the costs by way of damages.

Courts formerly scrupulous about it.

By what courts formerly granted.

Formerly indeed the courts were very cautious in granting interest. It used therefore to be done very rarely, and that not by all the courts of error, but only by the court of Exchequer Chamber established by 31 Ed. 2. holden before the lord chancellor, treasurer, and judges for examining erroneous judgments in the Exchequer, and by the King's Bench; but neither by the House of Lords, nor by the Exchequer Chamber established by 27 Eliz. c. 8. *Bodily v. Bellamy*, Burr. 1097.

And even in the King's Bench it was not allowed as of course, but only by special order of the court in particular cases. *Ibid.*

Afterwards it became more of course.

But by degrees the scruples of the judges with respect to granting interest vanished, and the court of King's Bench determined, that the word *damage* in the statute of Hen. 7. must mean something more than the mere costs; and that the interest ought to be the measure of such damage. Accordingly, a rule for the master to compute interest on the sum given by the jury on the *writ of inquiry*, from the day of signing final judgment below, down to the time of the taxation of costs on the affirmance of such judgment after error brought, was made absolute. *Zinck v. Langton*, Doug. 752.

Granted by court of Exchequer Chamber.

And now the court of Exchequer Chamber under 27 Eliz. allow interest by way of damage; which damage is in the discretion of the court, either to grant or refuse, and also to fix the quantity of the recompence. *Shepherd v. Macreth*, 2 H. Blac. 287, in which the different acts of parliament are enumerated and explained.

From what time interest computed.

The interest seems to be computed from the signing final judgment, if after verdict; but if judgment by default, in the case of *Zinck v. Langton*, interest was given from the time of signing interlocutory judgment to the time of the affirmance.

Now allowed by all courts of error, except House of Lords.

All the courts of error therefore, except the House of Lords, now give interest at their discretion upon application

plication by motion for that purpose, if not allowed on taxation of costs.

But the stat. of Hen. 7. does not extend to the House of Lords, only to courts of law; and whether the court in which error is brought can allow interest or not, must depend on that statute.

But the House of Lords give costs at their *discretion*, sometimes very large, and sometimes very small, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment in the court below; so that in their allowance of costs, they may, if they think fit, make the party some compensation.

Of the costs allowed by Parliament.

Besides, if an action is brought upon a judgment affirmed on error in the House of Lords, the jury, by way of damages, may give interest upon the sum recovered by the judgment from the time of signing it; which may be done whenever, by the practice of the court in which error is brought, such interest is not allowed in costs upon the affirmance. *Entwistle and others v. Shepherd and others*, 2 D. & E. 78.

Costs of error in Parliament allowed by a jury in an action.

So, where after an affirmance in the Exchequer Chamber of a judgment obtained in B. R. a *scire facias* was brought in B. R. against the bail in error, who, by sham pleas and the like, delayed payment until the interest exceeded the costs that by the ordinary taxation they were to pay; the court on motion ordered the master to allow interest from the time of affirming the judgment by the Exchequer Chamber. *Welford v. Davidson*, Burr. 2127.

After affirmance in error, bail liable to interest;

The bail therefore are liable to the interest due subsequent to the affirmance, because when the judgment is affirmed, it becomes from that time the debt of the bail; and if an action was brought on that judgment, the jury might give damages for the detention of the debt, so as to include interest up to the time of final judgment. *Frith v. Leroux*, 2 D. & E. 57.

But in debt upon recognizance, bail in error in the Exchequer Chamber are not liable to pay interest on the

but not liable to interest before affirmance.

the judgment between the signing of the judgment in B. R. and the affirmance of it in *cam. seacc.*; because it is beyond their engagement, as by their recognizance they undertake only to pay what was due upon the original judgment, and the costs given in the Exchequer Chamber. *Ibid.*

No interest on nonprossing writ.

No interest allowed on *nonprossing* a writ of error returnable in Parliament for want of transcribing, *Cumming v. Hanforth*, 14 Geo. 3. cited 2 D. & E. 58.; for when final judgment is given, the demand is liquidated, and no interest can be computed.

SECTION V.

A. Of staying Proceedings till Security for Costs are given.

B. Of staying Proceedings in a second Action till Costs of former one paid.

C. Of deducting lesser Costs from greater.

3.

A. Of staying Proceedings till Security for Costs are given.

Only two cases where security for costs required:

There are only two cases in which the court will interfere on behalf of a defendant to oblige the plaintiff to give security for costs.

1st, of an infant being plaintiff;

The first is when an *infant* sues, the court will oblige the *prochein ami*, or guardian, or attorney to give security for the costs, lest upon a nonsuit or verdict for defendant he should not have a responsible person to resort to for his expences. 1 Wils. 130. Str. 932. See on dem. *Selby v. Alston*, 1 D. & E. 491.

2d, of plaintiff residing abroad.

The second is, when the plaintiff resides abroad; in which case the court will stay the proceedings till security is given for the costs, because the plaintiff is beyond the reach of the process of the court; and therefore defendant,

defendant, if he succeeded, might not get any redress against him. *Pray and others v. Edie*, 3 D. & E. 207.

It extends therefore to plaintiffs resident in Ireland. *Fitzgerald v. Whitmore*, 1 D. & E. 362.

But before the court will grant such motion, defendant must put in bail. *De la Preuve v. Duc de Biron*, 4 D. & E. 697. In which case bail must first be put in.

In the Common Pleas the court is more strict in this respect, and do not order such security to be given, merely upon the ground of plaintiff's being resident abroad, but require an affidavit of his having gone thither to avoid payment of his debts, or of his insolvency in a foreign country, or the like. *Parquot v. Eling*, 1 H. Blac. 106. C. B. more strict than K. B.

And to gain such rule, it is not enough that plaintiff is a foreigner, he must be resident abroad; for it was refused on an affidavit that he was a foreigner, had left France to avoid being arrested for debt, and was in England insolvent. *Porrier v. Carter*, 1 H. Blac. 106. Plaintiff must reside abroad: being a foreigner not enough;

Nor will the court grant it merely because plaintiff is a foreigner, or because plaintiff is insolvent, though the action be a *qui tam* action. *Golding qui tam v. Barlow*, Cow. 24. *Real and others v. Mackay*, Str. 1206. even in *qui tam* actions.

B. Of staying Proceedings in a second Action till the Costs of the former one are paid. B.

Formerly it was held, that the courts could not stay the proceedings in a second action for the same cause until the *costs* of the former one were paid in any case excepting ejectments; and the reason given was, that ejectment, being the creature of the court, was considered more under the power of the court than other proceedings. *Real and others v. Macky*, St. 1206. Formerly only done in ejectment; why.

But in later times this rule has been extended to other causes. In *Moulton qui tam v. Bingham*, 17 Geo. 3, it was granted in an action of bribery, plaintiff having Now extended to other actions;

ing been nonsuited in the first action. Afterwards in an action for a malicious prosecution, proceedings were stayed till the costs which had been taxed as on a judgment in case of a nonsuit were paid. 2 D. & E. 511. n. And lastly, after a nonsuit in trespass for taking goods, the court stayed proceedings in a second action between the same parties for the same cause until the costs of the nonsuit were paid, *Weston v. Withers*, 2 D. & E. 511.; and this although plaintiff was a prisoner, and brought the second action *in formâ pauperis*. Ibid.

though plaintiff a prisoner and pauper.

Denied in C. B. because merits not tried.

But in the court of C. B. it was in one case, though a vexatious one, refused, because the merits had never been tried; but *quare*? 2 Blac. 810, *Cox v. Chubb*.

Court will not stay proceedings till judgment obtained against plaintiff satisfied.

But although defendant has recovered a judgment against plaintiff in a former action, on which same circumstances plaintiff now brings his action, the court will not stay the proceedings till the debt and costs on such judgment are paid, though upon an affidavit that defendant had never any dealings with plaintiff since that judgment, for they cannot try the merits upon affidavits. *Cooke v. Dobree*, 1 H. Blac. 10.

In what cases this rule will be granted in ejectment, see chap. 16. sec. 5.

C.

C. Of deducting the Costs of one Judgment from the Costs of another, or the like, and paying the Balance.

In cases of judgments;

If A. has recovered a judgment against B., and B. has also recovered a judgment to a greater amount against A., A. may apply to the court for leave to deduct the amount of his judgment from that of A. and pay the balance.

or costs;

So, if A.'s be only the costs of a judgment of nonsuit or the like against B. he may deduct those costs. *Thrustout v. Crafter*, 2 Blac. 826. And this although the judgments be in different courts. *Barker v. Braban*, 3 Will. 396.

or different parties;

So, if A. recovers against C., and C. recovers against A. and B., the court will permit C. on motion to set off the

Sec. V

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the damages which he has recovered against those obtained by A. *Mitchell v Oldfield*, 4 D. & E. 123.

So, where there are many defendants, and some go to trial and obtain a verdict, but others suffer judgment to go by default, the court will permit the costs and damages, on the judgment by default, to be deducted from the costs taxed on the *postea* to those defendants who had a verdict. *Schoole v. Noble* and others, 1 H. Blac. 23.

So, where several actions brought on two policies of insurance, underwritten by the same parties (among whom were A. and B.), were consolidated; but in one of the causes which goes to trial, A. is defendant, and in the other B., and the plaintiff becomes entitled to costs in one action, and the defendant in the other; the costs shall be set off and deducted, though the defendants be different, as under all circumstances such deduction is equitable. *Nunez v. Modigliani*, 1 H. Blac. 217.

So, where A. brings an action against B., the expences of defending which are borne by C. and D., but A. is nonsuited, and afterwards C. brings an action against A., in which D. is interested as well as C., and C. is nonsuited. The costs of the one nonsuit may be set off against the other. *O'Connor v. Murphy*, 1 H. Blac. 657.

It seems, therefore, that in both courts whenever the party is *equitably* entitled to the costs, they may be set off; because this does not depend on the statutes of set-off, but on the equitable jurisdiction of the courts over the suitors in it. 4 D. & E. 123.

There is however a difference in the practice of the two courts with respect to the interest or lien which they allow the attorney in the cause to have in or upon such costs.

In the King's Bench, the attorney is held to have a lien on the judgment to the extent of his costs paramount to any claim of set-off by the parties; and therefore, on applications in this court to deduct the amount of

or many defendants.

Where only an equitable interest;

Of the lien of the attorney.

Difference of practice in two courts in this respect.
How in K. B.

of one judgment from the other, or the like, it is upon an undertaking to pay the attorney having such lien his bill before any such set-off be made; for whenever an adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the court will take care that the attorney's bill is satisfied, *Mitchell v. Oldfield*, 4 D. & E. 124.; though they will not interfere by preventing the plaintiff from settling his own cause without first paying the attorney's bill. *Ibid.*

How in C. B.

Whereas in the court of Common Pleas, it is held, that the attorney only has such a lien on the costs as is subject to the equitable claims of the parties in the cause; so that the attorney has only a lien upon what his client is entitled to have after deducting such set-off or claim of the adverse party. *Schoole v. Noble*, 1 H. Blac. 23. *Thrustout* on dem. *Barnes v. Crafter*, 2 Black. 826.

How the motion should be framed.

Where the application is made by the party to whom the *larger* sum is due, the rule is for a stay of proceedings on acknowledging satisfaction for the *lesser* sum, by entering a *remittitur* on the record for it. 4 D. & E. 124. Bull. Ni. Pri. 336. But where the *lesser* sum is due to the party applying, the rule is to have it deducted, and for a stay of proceedings on payment of the balance. *Tidd on Costs*, 66.

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CHAP. XXII.

Of Amendments and Jeofails.

HAVING endeavoured to point out the mode of proceeding in a suit from its commencement to its conclusion, as well in common as in particular cases, it only remains to shew what defects in the proceedings may be amended, and what inaccuracies are of no signification, and therefore not required to be corrected.

Amendments
at common law.

Originally all proceedings were *ore tenus* carried on before the court by word of mouth; the *pleadings* in a cause were delivered *vivâ voce* at the bar; and any mistake might have been immediately rectified, until the record or judgment roll was made up, after which the judges could not erase or amend them, unless done within the same term, in which all mistakes might be amended, because it was a roll of that term, and even a new roll might have been brought in the cause, consequently the same roll might be amended. Gil. C. P. 108. 8 Co. 157.

Proceedings formerly *ore tenus*.

Amendments only wanted when record made up.

About the middle of the reign of Edw. 3. it became the practice to draw up the declaration and pleas out of court, and deliver them in writing to the prothonotary, which the adverse party had liberty to inspect, and perhaps might have a copy thereof to enable him to give in his plea in answer. The putting of pleadings into writing was the first step towards the refinement and subtilty affected by pleaders in aftertimes, though at first they went no further than was necessary, to bring the matter in question before the court with due clearness and precision. Hist. Eng. Law, 95. It is most probable that the declaration, when delivered to the prothonotary, was entered on a roll, together with the plea of the opposite party; this was the plea roll, which afterwards became, in construction of law, a record. This roll the different parties had access to in order to frame their plea or replication, or the like, or to take their exceptions; and when these were

Afterwards proceedings were put on the roll.

At length pleadings were delivered in paper.

Amendments became necessary.

Why allowed whilst proceedings in paper.

How to be applied for.

On what terms obtained.

Cannot add a new count after second term.

Proceedings in paper amendable at any time.

were to be argued, the roll was brought into court as the only pleading to be referred to. This course was certainly attended with some difficulties, and led to the expedient of putting the pleadings into paper, and delivering the paper from one party to the other, the entry on the roll being deferred till the pleadings were concluded; this proceeding greatly facilitated the perusal and correction of pleadings both of the party and his adversary, and made *amendments* more easy and decorous, than in the old method, which must have defaced the roll. These paper proceedings were introduced about the reign of Hen. 6. Hist. Eng. Law; 427.

These paper pleadings, delivered to and fro, supplied the declaring and pleading *ore tenus* at the bar; and this is the foundation of amendments by the court being always allowed, whilst the proceedings remain in paper, or are *in fieri* as it is termed, that is to say, before they are recorded, because they may in such stage be amended as easily as if spoken at the bar. Str. 11.

Upon application therefore to the court by motion, or to a judge at his chambers by summons, the proceedings may always be amended, let them be in what stage they may, and whether in matter of form or substance, whilst they are in *paper*; but this is done upon equitable terms, so that the other side may not be prejudiced. 2 Burr. 756. as paying costs, not delaying the adverse party, giving him time to plead *de novo*, which is generally two days after amendment made, or as the nature of the case may require, and the like. Sal. 47. Will. 7. 26. 223. 3 Sal. 31. 1 Sal. 517.

But plaintiff cannot, by way of amending his declaration, after the end of the second term, add a new count, because it is like a new declaration, and he cannot declare after the second term. 1 Will. 149. 223. Say. R. 234. Though in one instance, under particular circumstances, allowed. Str. 890.

But the other pleadings may be amended at any time whilst in paper, 2 Burr. 756. and in one instance, even after issue joined, and the cause made a *remanet* at the assizes. Say. R. 285.

Or

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Or he may, instead of amending, withdraw his replication, and reply *de novo*. 2 Burr. 756.

The same liberty of amending is given in cases of demurrer, whilst the proceedings are in paper, Sal. 520.; though formerly the court were more strict in this respect. Ld. Ray. 310. Sal. 50.

So in cases of demurrer.

So a demurrer may be withdrawn, and party be permitted to plead, and go to issue on the merits. Doug. 385. *Ayres v. Wilson*, Ibid. 452. Say. Rep. 416.

So pleadings may be withdrawn.

And even after argument on demurrer, amendments have been permitted; and in the case of the Dutcheffs of Portland, the court gave leave to amend after three solemn arguments on demurrer. *Steel v. Sowerby*, 6 D. & E. 173.

Amendments after argument.

And such amendments, whilst the proceedings are in paper, may be in *penal* actions, and even in *criminal* as well as *civil* proceedings. *Ibid*.

Amendments in penal actions, in criminal proceedings.

So, amendments upon informations are now a matter of course. *R. v. Holland*, 4 D. & E. 450.

But the court will not amend a *mandamus* after a return has been made to it. *R. v. Mayor of Stafford*, 4 D. & E. 689.

When not allowed in mandamus.

Nor in a penal action, after argument on demurrer to a plea in abatement, will they permit an amendment as to the parties in the suit. *Evans qui tam v. Stevens*, 4 D. & E. 228.

In penal actions;

Nor after proceedings had been depending so long, that plaintiff was too late to bring a new action. *Goff v. Popplewell*, 2 D. & E. 708. Provided unnecessary delay had been used on the part of the plaintiff; for otherwise, if he has proceeded with due diligence to trial, but withdrew the record from a fatal mistake being discovered, the court will afterwards permit him to amend, though the time limited by the statute has elapsed, and it would be too late to bring a new action; for amendments are in the discretion of the court. *Crofts v. Kayes*, Hil. T. 36 Geo. 3.

Amendments by
statute.

Such are the amendments at common law, but there are also other amendments authorized by statute; these are after the record is completed; for it may be remembered, that at common law the judges could not alter the proceedings after they had become a *record*, except during the same term, of which the record was. The reason why they could alter them within that time is, that during the whole term in which any judicial act is done, the record remains in the breast of the judges of the court, and therefore the roll is alterable during the term as they shall direct. But when the term is past, the roll is the record, and admits of no alteration. Co. Litt. 260.

How confined.

But as the rigour of the common law in preventing amendments of the record was frequently productive of great hardship and injustice, and the suitors were liable to be defeated of their judgment by a mere slip or inaccuracy of their attornies or clerks in court, the legislature in the reign of Edward 3. enacted, "That by the *misprision* of a clerk, in any place wheresoever it be, no *process* shall be annulled or discontinued by mistake in writing *one syllable* or *one letter* too much or too little; but as soon as the thing is perceived by challenge of the party, or in other manner, it shall be hastily amended in due form, without giving advantage to the party that challengeth the same, because of such misprision." 14 Edw. 3. ft. 1. c. 6.

Construction
thereof doubted.

This statute only related to proceedings before judgment; but upon the construction of it, and the extent to which it ought to be carried, much difference of opinion arose. Dyer, 342. 5 Co. 45. To obviate which the 9 Edw. 5. ft. 1. c. 4. after reciting the statute of Edw. 3. declared, that "the king, considering the diversity of opinions which had been upon the said statute, and to put the thing in more open knowledge, had ordained by authority of parliament, that the justices before whom such plea or record is made or shall be depending, as well by adjournment as by way of error or otherwise, shall have power and authority to amend such record and process as afore is said, according to the form of the same statute, *as well after judgment* in any such plea, record, or process given *as before judgment*, as long as the same record and process is before them, *in the same manner* as the justices had power to amend such

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"such record and process before judgment given by
"force of the said statute of Edw. 3."

So that this statute, which was made perpetual by
4 H. 6. c. 3. only extended the power to amend *after* judgment, but still confined it to a syllable or letter as before. Made perpetual
by 4 H. 6.

But by the 8 Hen. 6. c. 12. the power of the judges was enlarged, and it is thereby enacted, "That the king's judges of the courts and places in which any record, process, word, pleas, warrant of attorney, writ, pannel, or return, which for the time shall be, shall have power to examine such records, processes, words, pleas, warrants of attorney, writs, pannels, or returns by them and their clerks, and to reform and amend (in *affirmance* of the judgments of such records and processes) *all that which to them in their discretion seemeth to be misprision of the clerks therein, except appeals, indictments of treason, and of felonies and outlawries, so that by such misprision of the clerk no judgment shall be reversed nor annulled.*" Power enlarged.
by 8 Hen. 6.

"And if any record, process, writ, warrant of attorney, return, or pannel be *certified* defective, otherwise than according to the writing, which thereof remaineth in the Treasury courts or places from whence they are certified, the parties in *affirmance* of the judgments of such record and process shall have advantage to allege that the same writing is variant from the said certificate; and that found and certified, the same variance shall be by the said judges reformed and amended, according to the first writing." Variance amended be-
tween record
and certificate
thereof on cer-
tiorari.

Such are the statutes of amendment; and it is under the authority of the above statutes that all amendments are made of any record, at least after the term in which the record is of. What amend-
ments made un-
der the above
statutes.

And by this power given to the judges, which, for the expediting of justice, the courts are willing to exercise, process, as writs and the like, bail pieces, *nisi prius* rolls, records, judgments, and even writs in execution are amendable; for all of which see the different heads in the former part of this work, and particularly chap. 20. sec. 9. D. E. where different instances are

given of judgments being amended after error brought, and even the writ of error itself amended.

There should be something to amend by.

It is necessary, however, that in all such cases there should be something to amend by; as the *præcipe* whereby to amend the writ, the paper-book to amend the roll, the judges notes to amend the verdict, and the like; by which it may appear that the variance is a mistake, and therefore in strict justice ought to be rectified.

Difference between mistakes of parties and of the clerks.

For which reason also the courts make a distinction in allowing an amendment where the mistake has arisen from the act of the parties, as any defect in the pleadings, or from the mere mistake of the clerk, to which only the statutes seem to be confined.

The short case of *Green v. Kennet*, 1 D. & E. 782. will serve as an illustration of all the above points.

A rule was obtained to shew cause why the bill of Middlesex, which was filed in the 24th year of the reign of the present king should not be taken off the record to be amended according to the truth of the fact, and recorded again as of Hilary term, 25 Geo. 3.

How far matters of record amendable.

On the other side it was insisted that the court could not amend in this instance; it appearing upon the rule itself that the bill of Middlesex, to amend which was the object of the present application, was a matter of record. In the case of *Robinson v. Raley*, where, after a verdict found on some issues and a demurrer argued as to some others, an application was made by the defendant to withdraw the demurrers and plead, *Dennis*, Just. said, "The court cannot help seeing that this is upon record; therefore we cannot help this: I wish we could; because the merits seem to be with the defendant."

Difference between amending mistakes of the party and of the clerks.

Buller, Just.—In *Robinson v. Raley*, the application was to amend the pleadings, which was the act of the parties. But the reasoning of that case does not apply to the present; for this was a mistake of the defendant, and the motion is only to amend that mistake according to the truth of the case; and besides, in this case there is something to amend by, namely the *præcipe*; which

which is a circumstance by which the court has always been guided. There is a distinction between amending those mistakes which are occasioned by the act of the party, and those which are occasioned by the act of the clerk. As in the case of executors, if the clerk enter judgment *de bonis propriis* instead of *de bonis testatoris*, and error is brought, this court will order the entry to be amended, even if the record is sent back from the Exchequer Chamber. Here we see that this is a mere mistake of the attorney the present defendant.

Something to amend by.

Amendments after error.

Grose, Just.—In the court of Common Pleas, fines and recoveries are amended every day, upon the principle that there is something to amend by. *Green v. Rennet*, 1 D. & E. 782.

Amendment of fines and recoveries.

And now the courts are become so liberal, that where justice requires it, they will allow of amendments at any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they at present consider the proceedings as in *feri*, till judgment is given, and that therefore till then they may amend by the common law; but when judgment is given and enrolled, no amendment is permitted in any subsequent term. 3 Blac. Com. 407.

Time of amending now enlarged.

Desirous as the courts might be to extend the principle of amendments to the utmost stretch that the construction of the above statutes could bear, yet justice was too often impeded by writs of error brought for trifling omissions and inaccuracies in the record, which were not within the scope of the judge's power to rectify, and were therefore deemed fatal even after verdict and judgment.

Of the statutes of jeofails.

To remedy this evil, various statutes have been from time to time passed, called statutes of jeofail; so termed, because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error, (*je* or *jeo failé*,) he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the courts overlooking the exception. 3 Blac. Com. 408.

Why so called.

Operation thereof.

These statutes are many in number, of which a brief abstract shall be given in their order; and by them it

will be found that all trifling exceptions are so guarded against, that writs of error cannot now be maintained, but for some material mistake assigned. See a further account of the history of amendments, 3 Blac. Com. 408.

St 8 Hen. 6.
c. 12.

The first statute upon the subject is the 8 Hen. 6. c. 12. whereby it is enacted, "That no judgment nor record shall be reversed or avoided for any writ, process, warrant of attorney, or the like being *raised* or *interlined*."

32 Hen. 8. c. 30.

Insufficient
pleading.
Discontinuance
aided.

The 32 of Hen. 8. c. 30. enacts, "That if any issue be tried by the oath of twelve or more indifferent men, for the party plaintiff or demandant, or for the party of the tenant or defendant, in any action or suit at common law in any court of record, that then the justices by whom judgment thereof ought to be given, shall proceed and give judgment in the same, any *mispleading, lack of colour, insufficient pleading, or jessail, or any miscontinuance or discontinuance, or misconveying of process, misjoining of the issue, lack of warrant of attorney for the party against whom the same issue shall happen to be tried, or any other default of negligence of any of the parties, their counsellors or attornies had or made to the contrary notwithstanding; and the said judgments thereof, so to be had and given, shall stand in full strength and force to all intents and purposes, according to the said verdict, without any reversal or undoing of the same by writ of error or false judgments, in like form as though no such default or negligence had ever been had or committed.*"

18 Eliz. c. 14.

Informality in,
or want of original
warrant of attorney, &c.
aided.

The 18 of Eliz. c. 14. enacts, "That if any verdict of twelve men, or more, shall be hereafter given in any action, suit, bill, plaint, or demand, in any court of record, the judgment thereupon shall not be stayed or reversed by reason of any default in form, or lack of form, touching false Latin, or variance from the register, or other defaults in form in any writ original or judicial, count, declaration, plaint, bill, suit, or demand, or for want of any writ, or by reason of any imperfect or insufficient return of any sheriff or other officer, or for want of any warrant of attorney, or by reason of any manner of default in process, upon or after any aid prier or voucher, nor any

"any such record of judgment after verdict to be given
 "hereafter, shall be reversed for any the defects or
 "causes aforesaid; provided that the said act shall not
 "extend to any writ, declaration, or suit of appeal
 "of felony or murder, nor to any indictment or pre-
 "sentment of felony, murder, treason, or other matter,
 "nor to any process on any of them, nor to any writ,
 "bill, action, or information upon any popular or
 "penal statute."

Exception.

The 21 Jac. 1. c. 13. enacts, "*That if any verdict of* 21 Jac. 1. c. 13.
 "twelve men or more shall hereafter be given for the plain-
 "tiff or demandant, or for the defendant or tenant,
 "bailiff in assize, vouchee, pray in aid, or tenant by
 "receipt, in any action, suit, bill, plaint, or demand in
 "any court of record, the judgment thereupon shall
 "not be stayed or reversed by reason of any *variance in* Variance.
 "form only, between the original writ or bill, and the de-
 "claration, plaint, or demand, or for lack of any aver-
 "ment of any life or lives of any person or persons, so as
 "upon examination the said person be proved to be in
 "life; or by reason that the *venire facias, habeas cor-* Wrong award of
 "*pora, or distringas,* is awarded to a wrong officer, venire or ve-
 "upon any insufficient suggestion, or by reason the *visne* nue,
 "is in some part misawarded, or sued out of more
 "places, or of fewer places, than it ought to be, so as
 "some one place be right named; or by reason that any
 "of the jury which tried the said issue is misnamed, either
 "in the surname or addition in any of the said writs, Misnomer of
 "so as upon examination it be proved to be the same jury.
 "man that was meant to be returned; or by reason
 "that there is no return upon any of the said writs, so
 "as an panel of the names of jurors be returned and
 "annexed to the said writ; or for that the sheriff's
 "name, or other officer's name having the return there-
 "of is not set to the return of any such writ, so as upon
 "examination it be proved that the said writ was re-
 "turned by the sheriff, or under sheriff, or any such
 "other officer; or by reason that the plaintiff in an
 "ejectione firma, or in any personal action or suit, be-
 "ing an infant under the age of one-and-twenty years, or infant ap-
 "did appear by attorney therein, and the verdict pass
 "for him; provided that the said act shall not extend
 "to any writ, declaration, or suit of appeal of felony or
 "murder, nor to any indictment or presentment of
 "felony,"

Variance.

Want of aver-
ment of lives.

Wrong award of
venire or ve-
nue.

Misnomer of
jury.

Want of return
of writs;

or name of of-
ficers thereto;

or infant ap-
pearing by at-
torney.

Exception.

"felony, murder, or treason; nor to any process upon
 "any of them; nor to any writ, bill, action, or infor-
 "mation upon any popular or penal statute."

16 & 17 Car. 2.
 Omnipotent act.

The 16 & 17 Car. 2. c. 8. (called by Twysden the
 omnipotent act), enacts, "*That if any verdict of twelve*
 "*men shall be given in any action, suit, bill, or demand,*
 "*in any of his majesty's courts of record at Westminster,*
 "*or in the counties palatine of Chester, Lancaster, or*
 "*Durham, or in his majesty's courts of the great sessions*
 "*in Wales, judgment thereupon shall not be stayed or*
 "*reversed, for default in form or lack of form; or by*
 "*reason that there are not pledges, or but one pledge to*
 "*prosecute, returned upon the original writ; or be-*
 "*cause the name of the sheriff is not returned upon such*
 "*original writ, or for default of entering pledges*
 "*upon any bill or declaration; or for default of alleg-*
 "*ing the bringing into court of any bond, bill, indenture,*
 "*or other deed, mentioned in the declaration, or other*
 "*pleading; or for default of allegation of the bringing*
 "*into court letters testamentary or letters of administra-*
 "*tion; or by reason of the omission of vi & armis, or*
 "*contra pacem; or for or by reason of the mistaking of*
 "*the christian name or surname of the plaintiff or de-*
 "*fendant, demandant or tenant, sum or sums of money,*
 "*day, month, or year, by the clerk, in any bill, decla-*
 "*ration, or pleading, where the right name, surname,*
 "*sum, day, month or year, in any writ, plaint, roll, or*
 "*record, preceding, or in the same roll or record where*
 "*the mistake is committed, is or are at once truly and*
 "*rightly alleged, whereunto the plaintiff might have*
 "*demurred, and shewn the same for cause; nor for*
 "*want of averment of hoc paratus est verificare; or for*
 "*hoc paratus est verificare per recordum; or for not al-*
 "*leging prout patet per recordum; or for that there is*
 "*no right venue, so as the cause were tried by a jury of*
 "*the proper county or place where the action is laid;*
 "*nor any judgment after verdict, confession by cognovit*
 "*actionem, or relicta verificatione shall be reversed for*
 "*want of misericordia or capiatur; or by reason that a*
 "*capiatur is entered for a misericordia, or a misericordia*
 "*for a capiatur; nor for that ideo concessum est per*
 "*curiam is entered for ideo consideratum est per curiam;*
 "*nor for that the increase of costs after a verdict in any*
 "*action, or upon a nonsuit in replevin, are not entered*

Want of
 pledges;
 or sheriff's
 name to return;

or want of pro-
 test;

or omission of
 vi et armis;

or mistake in
 parties names,
 dates, sums, &c.

Want of aver-
 ments;

or of right
 venue;

want of miseri-
 cordia, &c.;

or costs not en-
 tered right;

"to

"to be at the request of the party for whom judgment is given; nor by reason that the costs in any judgment are not entered to be by consent of the plaintiff: but that all such omissions, variances, defects, and all other matters of like nature, not being against the right of the matter of the suit, nor where- by the issue or trial are altered, shall be amended by the justices, or other judges of the courts where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error; not to extend to appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason, or other matter; nor to any writ, bill, action, or information upon any penal statute, other than concerning customs and subsidies of tonnage and poundage."

exception as to criminal cases, &c.

It is to be observed that by the above statutes, all defects in mere matters of form are remedied, taking notice of the several parts of the proceedings from the original writ to the verdict; and pointing out what irregularities and mistakes therein shall be cured *after* verdict. But such defects were still fatal if there was no verdict, as in case of judgment by confession or default or the like, which occasioned the provision in the 4 & 5 Anne, c. 16. which enacts, "That all the statutes of jeofails shall be extended to judgments entered *upon confession, nil dicit, or non sum informatus*, in any court of record; and no such judgment shall be reversed, nor any judgment upon any writ of enquiry of damages executed thereon, shall be stayed or reversed, for or by reason of any imperfection, omission, defect, matter, or thing, which would have been aided and cured by any of the said statutes of jeofails, in case a verdict of twelve men had been given in the said action or suit, so as there be an *original writ or bill, and warrants of attorney* duly filed."

Above statutes only extended to cases after verdict.

4 & 5 Ann. c. 16. extends them to judgments by default, confession, &c.

Except want of original and warrants.

Still, therefore, when judgment is by default, want of an original or warrants of attorney is a good cause of error.

And even after verdict, though by the statute of Eliz. the want of an original is cured, and by the equity of that act, the want of a bill on the file, which is in the nature

Though want of original or of bill is aided, a bad original is not.

nature of an original, is also aided (Cro. Eliz. 722.); yet if there be an original, and it is a *bad* one, such *vicious* writ is not cured. So a *bad venire, distringas,* or the like, is not aided, though the *want* of one is.

Stat. 27 Eliz.
and 4 & 5 Ann.
making defects
in form, causes
only of special
demurrer.

Thus, of mistakes and imperfections in matters of form, as above-mentioned, no advantage can be taken after verdict or after judgment by default; still however they would have been fatal upon *demurrer*, and the proceedings held bad for any of the above informalities even upon a *general* demurrer, had not the legislature guarded against it, first by the stat. 27 Eliz. c. 5. which enacts that no want of *form* in the proceedings shall be regarded, except shewn for special cause of demurrer, and lastly, by the stat. 4 & 5 Anne, c. 16. which extends the stat. of Eliz. to many defects, which otherwise would have been deemed matter of *substance*.

4 & 5 Ann c. 16.
extending
27 Eliz. to some
defects heretofore
matters of
substance.

The stat. 4 & 5 Anne, c. 16. enacts, "That where
" any *demurrer* shall be joined and entered in any
" action or suit in any court of record, the judges shall
" proceed and give judgment, according as the very
" right of the cause and matter in law shall appear unto
" them, without regarding any *imperfection, omission, or*
" *defect in any writ, return, plaint, declaration, or other*
" *pleading, process, or course of proceeding whatsoever,*
" *except those only which the party demurring shall spe-*
" *cially and particularly set down and express, together*
" *with his demurrer, as causes of the same, notwith-*
" *standing that such imperfection, omission, or defect,*
" *might have been taken to be matter of substance, and not*
" *aided by the statute made in the twenty-seventh year*
" *of queen Elizabeth, &c. so as sufficient matter appear*
" *in the said pleadings upon which the court may give*
" *judgment, according to the very right of the cause;*
" *and therefore no advantage or exception shall be*
" *taken of or for an immaterial traverse; or of or for*
" *default of entering pledges upon any bill or declara-*
" *tion; or of or for the default of alleging the bringing*
" *into court any bond, bill, indenture, or other deed men-*
" *tioned in the declaration or other pleadings; or of or*
" *for the fault of alleging the bringing into court letters*
" *testamentary or letters of administration; or of or for*
" *the omission of vi & armis and contra pacem, or either*
" *of them; or of or for the want of averment of hoc*
" *paratus*

"*paratus est verificare, or hoc paratus est verificare per recordum*; or of or for not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer."

All the above statutes only extended to civil proceedings, but by the stat. 9 Anne, c. 20. "All the statutes of jEOFails are extended to all writs of *mandamus*, and informations in the nature of *quo warranto*."

9 Ann. c. 20.
above statutes
extended to
mandamus, &c.

It may be observed, that in the statutes of 18 Eliz. 21 Jac. and 16 & 17 Car. 2. there is a provision that they shall not extend to criminal proceedings, nor to penal actions, which provision is not in the 32 Hen. 8.; and it has been held that penal actions are within the stat. Hen. 8. *Richards qui tam v. Brown*, Doug. 115.

How far penal
actions within
32 Hen. 8.

The last statute upon the subject is, the 5 Geo. 1. c. 13. whereby after verdict no judgment can now be stayed or reversed for any defect or fault either in form or substance in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings: this statute does not extend to criminal cases, but no exception is mentioned as to penal actions.

5 Geo. 1. c. 13.
all defects in
writs aided after
verdict.

This statute also authorises the amending of writs of error, which none of the other statutes did, because they only gave a power of amending in *affirmance* of judgments, whereas writs of error have a direct contrary tendency.

And writs of
error amendable.

THE
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A P P E N D I X.

THE Editor thinks proper to inform the Reader, that a great part of the following Appendix is collected from the Introduction to the Book of Practice, published by the late Mr. Crompton, the Copyright of which is the property of the Editor: For as the present Work is intended to supply the place of that, the Editor feels it a duty incumbent upon him not to deprive the Profession of any part of that Work which may be deemed useful and improving.

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APPENDIX (A).

Of the Origin and Jurisdiction of the respective Courts.

THE darkness and obscurity in which the history of the remoter ages of antiquity is hidden, render it difficult to obtain any clear or accurate account of the legal polity of the ancient Britons, or of those nations that from time to time made inroads upon and settled among them.

But in the reign of the great and illustrious Alfred, the light of information breaks in upon us; and we find, that upon his succession to the monarchy of England, founded by his grandfather Egbert, the constitution of the country was entirely new-modelled, and the whole kingdom reduced under one regular and gradual subordination of government, wherein every man was answerable to his immediate superior for his own conduct and that of his neighbours. By his establishment the people were classed in *decennaries*, consisting of ten families each, who were reciprocally the pledges and compurgators of each other. Ten of these *decennaries* made up the larger division of an *hundred*, and an indefinite number of these hundreds composed the still larger division of a *county*. Over every class of people presided the most discreet and able amongst them. Over the county were the alderman, (who, after the *Danish* invasion and conquest, was denominated the earl,) bishop, sheriff, and coroner. Over the hundred, the lord; and over every tything, the tythingman or borsholder. In the few miserable towns in which there was any trade, the people were in all probability under some species of corporate government, of the nature of which we are little informed. Writers, describing

Decennaries.

Hundreds.

Counties.

How each governed.

Of the state of towns at that time.

describing the progress of society, apprehend that some such government existed in them; but say, that it was under absurd regulations, built on oppressive notions, and tending rather to curb than assist the spirit of industry and commerce. And so well indeed are they convinced of this fact, that they assign it as one of the principal causes, that prevented towns in *England* as well as in other parts of *Europe*, from emerging out of the despicable state they continued in till the dawn of the fifteenth century.

Laws, how made.

Jurisdiction of decennaries.

Of the county court.

View of frankpledge, what.

Division of county court into criminal and civil court.

Origin of court-leet and court-baron.

Of the ordeal, corfned, or wager of law.

The laws at this time were few and simple, made at the general assembly of the state when convened by the sovereign, and promulged to the people by the earls and sheriffs in their perambulations through their several counties, in order to array and class the people within them. Matters of debt and contract were usually adjusted in the *decennaries*, but the principal causes came into the great county court, held by the sheriff, who was assisted by the bishop and earl, which court had cognizance, First, Of offences against religion; Secondly, Of temporal offences which concerned the public, as felonies, breaches of the peace, nuisances, and the like; Thirdly, Of civil actions, as titles to land, and suits upon debt or contract. Besides which, it also held the view of *frankpledge*; an inquest impannelled by the sheriff, to see that every one above the age of twelve years had entered into some tything and taken the oath of allegiance. From the time of king Edgar, this great county court was divided into two; the one a *criminal*, the other a *civil* court. The criminal was called the sheriff's tourn, and was held by the sheriff and bishop twice in the year in the months following *Easter* and *Michaelmas*, for the purpose of trying all criminal matters whatever; from this was afterwards derived the court-leet. The civil court retained the name of the county court (from which came the court-baron), and in it all the civil pleas of consequence arising in the county were discussed and decided. In the criminal court, offences were enquired of by an inquest impannelled, and offenders were punished according to the superstition of the times; if they did not purge themselves of the matter wherewith they were charged by the *ordeal*, by the *corfned* or morsel of execration, or by wager of law with compurgators. In the civil court, parties

parties complained against might purge themselves by their sureties by wager of law. Trial by *jury* was also frequently used; for that mode of trial is undoubtedly of *Saxon* origin; though whether such jury was composed only of twelve men, or whether they were bound to a strict unanimity, is not precisely known at this distance of time.

Trial by jury.

Great advantages attended the establishment of these tribunals. The people were not drawn away from their domestic avocations, to attend causes at a great distance from home; due order was observed throughout the kingdom, the public peace secured, and justice administered to every one in an easy and expeditious manner by the intervention and suffrages of his neighbours. But in case a party conceived himself to be aggrieved by the judgment, or by favour or affection shewn at the trial of the cause, there lay an appeal to the king in his supreme court, or general assembly of the state, called the *Wittenagemote*; which was convened annually, or oftener, where the sovereign pleased, to consult on public business, and to try great offenders, and which, in short, had a supreme and universal jurisdiction. To this supreme court, as the nation emerged from its state of barbarism, and civilization put men on different pursuits, whereby litigations increased, appeals became frequent; so that the intervention of the *Wittenagemote*, to settle the various claims and pretensions to property, and reconcile differences, at length grew necessary in almost every case. But, notwithstanding the exercise of this *appellant* jurisdiction must have taken up a considerable share of the time allotted for the sitting of this great assembly, it does not appear that there was any other tribunal erected for the hearing and investigation of appeals from the inferior courts. Such was the nature of the jurisprudence of the country till the time of the conquest. For although the *Anglo-Saxon* constitution received many severe shocks from the irruptions of the Danes and other nations, and many new laws and customs were introduced by the several invaders; yet so excellent was the outline of the government, as sketched by the masterly hand of king *Alfred*, that through the various revolutions, neither the provincial nor judicial polity of it were discontinued or materially altered. It is certain however, that the whole race of

Advantages of the above tribunals.

Of the court of appeal.

The *Wittenagemote*.

Appeals to it became frequent.

Such the state of things till the conquest.

our *Saxon princes*, on their accession to the throne, with the advice of their great council, made such alterations in the laws as the exigencies of the times might require.

Alteration by
the Conqueror.

Introduction of
the feudal
system amongst
his followers.

Law thereby
became intri-
cate.

General esta-
blishment
of the feudal
system.

Nature of it.

Consequences
thereof upon
the business in
inferior courts.

But when the *Conqueror*, by the decisive advantage he gained over *Harold* at *Hastings*, got possession of the crown, he put in force the old *Saxon* law, by which the estates of all persons were forfeited, who were found in arms in opposition to their sovereign. These he divided amongst his followers and favourites, to hold of him by the like military and feudal services which prevailed in his native duchy of *Normandy*; the nature of which was scarcely known here before his arrival. This new establishment, involving in it a variety of prerogatives and duties due from such tenants to the king, necessarily introduced a great alteration in the constitution of the kingdom. The remedies for the recovery of these duties, and the consequences of neglecting them, together with the appendages of such tenures, became the most material and intricate learning in the law: by far too intricate for the understandings of the suitors in the county-courts and courts-baron; and which, for that reason, came usually to be discussed in the sovereign Eyre of the king. The subsequent treasons too, of such of his *English* subjects as were permitted to retain their ancient possessions, had so much increased the Conqueror's ability during the first thirteen years of his reign, to enlarge the number of these grants with feudal reservations, that he at length took occasion, in a general meeting of the realm, to introduce universally that system of laws, which at first had only a partial reception amongst his followers from *Normandy*. The grand principle of this system was, that all lands were held *mediately* or *immediately* of the king, by the services in the grants thereof respectively reserved.

Upon this general establishment of the *feudal system* in *England*, all the intricacies and refinements, which distinguished it on the continent, were imported into this country by the *Norman* justiciars; and, as the suitors and judges in the inferior courts were unable to decide the law on the subject, it became necessary to apply in almost every case to the supreme council of the crown; which necessity was still further increased, by a distinction

distinction introduced soon after the Conquest, between courts of record and not of record. For by an edict of the Conqueror's it was ordained, that all proceedings in the king's courts should be carried on in the *Norman*, instead of the *English* language. By this edict the remedial influence of the county-courts, and other inferior jurisdictions, was necessarily narrowed: for as the judges and suitors of such courts did not understand that language, they were prohibited from recording their acts. So that the discussion of matters of importance ceased in the great *Saxon* seats of justice, and an original jurisdiction over all causes was given to the supreme court where the king presided in person. The dignity and importance of the county-courts was also further impaired by the secession of the bishops*, and the separation which took place in consequence of their secession between the *civil* and *ecclesiastical* courts. The earls too shortly afterwards neglected to attend them; from which time their consequence has been gradually declining, and though there remains a shadow of them to this day, it is but a shadow of their pristine splendour and dignity.

Distinction between courts of record and not of record.

Introduction of Norman language.
Effect thereof.

Original jurisdiction given to supreme court.

Secession of bishops from county-courts.

Decline of county-court.

The clergy had been for some time endeavouring throughout *Europe*, to exempt themselves from the secular power; and as they had all along seconded the views of the Conqueror, he thought it most prudent to comply with their demands. He therefore granted them several immunities, and amongst the rest he permitted the bishops to establish courts in their several dioceses, in which they assumed a jurisdiction over the inferior clergy and all their dependants, who were to have justice dispensed to them in the consistorial court by the bishop or his substitute. The erection of these courts for the future investigation of ecclesiastical matters, with which the secular judges were no longer to interfere, not only deprived the county-courts of a great number of causes, and the attendance of many suitors, but also of the assistance and veneration they derived from the learning and ability of the prelates. And though the disputes which afterwards arose between the bishops themselves, and such of the clergy as were able to cope with them,

Separate jurisdiction of the clergy.

Ecclesiastical courts established.

Another cause of decline of county-courts.

* In the time of *William* the Conqueror it was ordained, *quod Episcopus vel Archidiaconus* (who before sat with the sheriff) *plecita in hundredis non tenet*; but right shall be done by himself according to the Canons, &c.

called for the necessity of a jurisdiction somewhere, yet their litigations usually came into the sovereign *Eyre*. For however willing in those days they might have been to appeal to the supreme pontiff for justice, they were nevertheless glad to have it administered at home by the king's court, held before himself in person at the time of his parliaments; which were usually assembled where he kept the three great festivals of *Christmas*, *Easter*, and *Whitsuntide*.

Jurisdiction of
supreme coun-
cil increased.

Inconvenience
thereof.

Judicial power
separated from
deliberative.

Institution of
the *Aula Regia*.

The *Aula Regia*
was ambula-
tory.

Jurisdiction
thereof; origi-
nal—appellate.

How increased
by cognizance
of causes above
40 s.

The *original* as well as *appellate* jurisdiction, exercised by the supreme council when convened *, in like manner as by the *Wittenagemote* in the Saxon times, drew into it the final determination of all causes of consequence, whether of ecclesiastical, civil, or criminal cognisance. So extensive a jurisdiction, interfering with the discussion of matters of state, occasioned the members thereof, when assembled, to sit for a long time together. But the Conqueror, finding these long sessions inconvenient, and apprehending danger from so large a meeting of his chief vassals, under the pretext of easing the subject by erecting a constant court for the trial of causes and determination of appeals, took an opportunity to separate the *judicial* power of the members of this assembly from their *deliberative* as counsellors to the crown. In this new court erected in his own palace, and thence called by *Braeton*, *Aula Regia*, sat with other chief vassals, the first officers of state, the Chancellor, Earl MARESCHAL, Chamberlain, Seneschal and Treasurer; over all of whom presided a special and new appointed magistrate, next in authority to the king himself, called *Capitalis Justiciarius totius Angliæ*.

This new erected court by its constitution was ambulatory, and followed the sovereign whenever he changed his place of abode. In the county where it happened to be, it had an *original* jurisdiction of all matters arising therein, whether of a civil or criminal nature; but of causes arising in other counties it only exercised an *appellate* jurisdiction. And to give this capital *justiciary* a more extensive authority, and to lessen still further the remaining influence of the county-courts, it was ordained by the Conqueror, that from

* *Vide* Sp-1. *Glof. verbo* Parliamentum.

thenceforth

thenceforth all causes of action amounting to *forty shillings* and upwards should be determined by the king's writ, which was usually made returnable in the *Aula Regis*; but in some cases they were made out to give the sheriff authority to proceed in the suit, and then they were called *Vicontiel*. *Vicontiel* writs were of two sorts, the one founded on *Torts*, the other on *Contracts*. The *vicontiel* writs adapted for torts were those of *trespass*, *replegiari facias*, *nuisance*, and others of the like nature; and those for matters of contract were called writs of *justicies**, which was a command to the sheriff to do justice between the parties in that particular cause; for if the debt or demand exceeded *forty shillings*, the sheriff was no longer empowered to hold plea thereof by a *plaint* levied in court as in the Saxon times. So also the *writ of right*, issued to enable the lord to hold plea of land within his jurisdiction. For the maxim introduced by the *Norman* justiciars was, that no one could hold lands without the king's *patent*, nor plea of *forty shillings* without the king's *writ*.

Vicontiel
writs, what.

Justicies, what.

Plaint extent
thereof.

Writ of right.

Though these great officers at the establishment of the *Aula Regis* sat together in court, as well to try the civil and criminal matters referred to them, as to receive and settle the revenue; yet our legal *antiquarians* think, that, even at this period of time, each of them had a peculiar office and jurisdiction assigned to him. The Chancellor, it is supposed, as being the king's chaplain and confessor, more immediately presided when the complaint was of some oppressive act of the sovereign—The Treasurer, when the revenues and rents were to be received from the sheriffs, and the fines and amerciaments from the escheators, and on passing the public accounts—The Constable and Marechal†, upon the

Different officers
presiding
in *Aula Regis*.

The respective
duties of

the Chancellor;

Treasurer;

Constable and
Marechal;

* Though a *Justicies*, *Replegiari facias*, and other *vicontiel* writs may be had of course at this day, and if improperly issued, the party has no redress but by *superfedeas quia improvide emanavit*; yet it is not improbable but that, at the commencement of the *Norman* period, before the extent of the remedy given, by the various writs of *accedas ad curiam*, *recordari facias loquelam*, *false judgment*, &c. were fully established, the Chancellor exercised a discretion in allowing these writs, and only permitted them to go in those cases where the policy of reducing the county-court was not necessary to be regarded. *Vide* of superceding writs, 1 *Eq. Abr.* 415. and title Writs in the abridgments.

† In our old books there is great confusion with respect to the number and duty of the Marshals. *Vide* Mr. *Madox*, from page 31 to 33, and

Seneschal ;

Chamberlain.

the discussion of matters of honour, and war, and the rights of foreigners—The Seneschal, when the dispute arose within the limits of the royal residence—and the Chamberlain, when the money was to be told in and paid out of the Treasury.

Tenants of
ancient demesnes;
their rent ;

afterwards
reduced to a
fixed sum.

Remedy of
sovereign
against them.

The Conqueror, like his predecessors, had his royal table supported by the tenants of his *ancient demesnes*, whose annual renders of *corn, sheep, oxen*, and other produce of their lands, were brought to the place of his residence. And that the same might be paid with more punctuality and convenience to the respective tenants, the sovereign frequently changed his place of abode. But *Henry the First* generally commuted these renders into certain fixed sums, after whose reign, the removal of the king's household being no longer necessary, we find it to have been less frequent. The sovereign's remedy against these tenants in *ancient demesne*, upon neglect to discharge their bounden renders, was by entry and seizure of their lands, without applying to any court for redress, or taking out any process against them. And if such entry and seizure were improperly made, the tenant's only remedy was by petition to the king's bailiff, the steward of the court of *ancient demesne*, who heard and finally determined the matter ; so that no other court interfered between the king and his tenants, with regard to these renders *.

Of the other
chief vassals.

Our greatest legal *antiquarians* have so long and so widely differed, concerning the other chief vassals of the crown previous to the Conquest, whether they were military tenants, socage tenants, or whether they were tenants at all, but merely allodial possessors (*allodarii*), that it might appear unbecoming to interfere with their discussions. But certain it is, and indeed agreed by them all, that the slavish services, the perpetual concomitants of our old tenures, were unknown in this country till introduced by the *Norman* justiciars shortly after the Conquest. At which time the establishment of the *feudal* burdens of *escheat, fines for alienation*,

Of the feudal
burdens and
fines.

and several of the old statutes. Lord Coke styles the marshal who presided with the constable, the *Earl Marshal of England*, by way of pre-eminence. 4 *Instit.* 123. *Co. Lit.* 74.

* *Vide* Brac. lib. 1. c. 11. who in describing these tenants says, "*quod a gleba amoveri non poterint, quamdiu solvere possunt debitas pensiones.*"

primer-

primer-seisins, aids, wardship, marriage and relief, with their numberless appendages, multiplied the pretensions of the crown to some claim or other, on every alteration in the family or domestic concerns of the tenants. These claims and pretensions, and disputes in consequence of them, were at first heard and adjusted with all other matters of importance in the court where the Chief Justiciar presided. But as the revenues thereby derived were very considerable, and generally well paid to the receivers in the country, it was found necessary that their accounts should undergo a closer inspection and revision than could possibly be given them in the supreme court, whose attention was wholly engrossed by the multifarious matters referred to it. The Conqueror therefore appointed a select committee, of whom the Treasurer was the chief, to sit apart from the supreme court, in a chamber of his palace, particularly to *audit* these accounts, and compel the payment of those dues to which he laid claim. This court was built on the model of one erected for the like purpose in his own native duchy. It assumed the name of the king's *Scaccarium* or Exchequer, and the same authority was delegated to its judges, as was exercised by the *masters of the Exchequer* in Normandy. This new court on its establishment stripped the *Chief Justiciar*, in the very zenith of his power, of a material branch of his jurisdiction; though it appears that this powerful magistrate for some time afterwards continued to interfere in the Exchequer. For in dialogue *de Scaccario*, lib. 1. c. 9. speaking of this officer, it is said, "he was great in the Exchequer, as well as in the court—so that nothing of moment was or could be done there without his consent or advice." However, this first deprivation of the Chief Justiciar's authority, who on his appointment was invested with powers so large and boundless, that he became both a tyrant to the people, and formidable to the crown itself, certainly arose from mere necessity, and not from the jealousy either of the sovereign or his people, to which the subsequent diminutions of it are properly attributed.

Disputes concerning them, where settled.

Origin of court of Exchequer

An abridgment of Chief Justiciar's power.

In this court of *Exchequer* were all matters relating to the revenue hereafter to be determined; so that when any patent or royal grant was sealed by the Chancellor, the same was *estreated* into this court, and execution

Jurisdiction of the Exchequer.

Of estreats, &c.

How altered by
Edw. 1.

ection went forth for the reservations therein contained to the crown. So all original writs from the Chancellor, giving other courts a jurisdiction to hear and determine causes between the people, gave the court of Exchequer a power to collect the fines and amercia-
ments due to the king, in the progress and investigation of those causes imposed on the parties. And when the great court inflicted fines on criminal offenders, the records were estreated into the Exchequer, from whence issued a process to get in the same; or if they had been paid to the clerk, he was made to account for them there. In this court too, all the Sheriffs, Coroners, Escheators, and other officers employed in receiving the revenue, were to make up and pass their accounts. With jurisdiction over such matters, this court continued till the reign of *Edward the First*, who is supposed to have formed it in the manner we find it at this day; consisting of *two divisions*, the receipt of the Exchequer, and the court or judicial part of it, which hears causes relating thereto. And it has long since been both a court of *equity* and *common law*, and holds plea of matters not at all relating to the revenue, arising between subject and subject.

The process used on the common law side of the court of *Exchequer* may be seen in a variety of tracts, and does not properly come within the scope of this work, which is only intended to explain the origin and operation of the process of the courts of King's Bench and Common Pleas; but to do this in a satisfactory manner, it was necessary to treat slightly of the jurisdiction of the *Aula Regis*, instituted by the *Norman invader*, and to shew what share of that jurisdiction our several courts of justice at this hour respectively exercise.

Of the equity
side of Ex-
chequer.

Origin account-
ed for.

From what has been said of the origin of the *Exchequer*, it may naturally strike the student as something remarkable, that there should exist in it a court of *equity*, as well as a court of *law*. The precise time when the court of Exchequer first assumed an *equitable* jurisdiction, or from what cause it originated, is not well ascertained. But we may reasonably suppose, that when it was found necessary, in order to effectuate justice, to propound articles to compel persons to answer *upon oath* to allega-
tions

tions therein contained, between subjects in civil suits, and which articles were made to the king, and by him generally referred to his chancellor, the officer of the crown (in later times called the Attorney-General), was induced to exhibit like articles in the Exchequer for the discovery of facts relating to the revenue. Hence arose informations for *treasure-trove*, and for the discovery of the forfeited goods of an *outlaw* filed in the *Exchequer* *. And when afterwards this court, by the exposition they put on the statute of *Rutland* †, by which it is enacted, "That no suit shall be prosecuted in the Exchequer, unless it concern the king or his officers." held in contradiction to the evident meaning of the legislature, that pleas between subjects who were *debtors* to the crown, came within the idea of ministers of the Exchequer, this court upheld a jurisdiction as well of matters inquirable by exhibited articles, as of matters cognizable in actions at common law. And though the *subpœna* was not invented in Chancery till the reign of *Edward* the Third, they certainly before that time exercised both an equitable jurisdiction on exhibited articles, and in actions at common law, whenever the complainant suggested that he was a *debtor* or *fermor* to the king. It seems too, that before the *subpœna* was invented, the process they used was a *venire*, *attachment*, and *commission of rebellion*, the process usually awarded in the *Aula Regis* on great and particular occasions. But when *Richard de Waltham* had devised the *subpœna* returnable in Chancery, the treasurer of the Exchequer, in imitation of it, framed a similar writ for matters of *equity*, under the seal of his own court, returnable before himself, instead of using the process of the *venire* in the first instance; retaining, however, that and its following process, in case the party should shew any contumacy to his *subpœna*. The Exchequer writ of *subpœna* was also afterwards extended as an original process in a civil action commenced there, though how long before the reign of *Henry* the Eighth is not well known. And this writ, together with the *venire ad respondendum*, and writ of *quo minus*, which came into use in civil actions between subject and subject in consequence of the above exposition of the statute of *Rutland*, are the three methods at this day of commencing

Jurisdiction increased by the causes of king's debtors being heard there.

And the fiction of the *quo minus*.

* *Hard. 22.*

† 10 *Edward* the First.

civil

civil actions in the court of *Exchequer*. But to return to the remaining jurisdiction of the *Chief Justiciary*.

Aula Regia
still retained
great power.

Causes of its
abridgement.

The *Aula Regis*, wherein the magistrate presided, had still an original jurisdiction over all causes of moment not immediately concerning the revenue, cognizance of all criminal offences committed in the county where it happened to be, the punishment of all capital delinquents, and an *appellate* jurisdiction from every inferior common law court in the kingdom. It was not long, however, before the authority which this magistrate enjoyed received another considerable shock. For as it was the duty of the *Chief Justiciar*, as well as the rest who composed the *Aula Regis*, to attend their sovereign, and be at hand to advise him in all matters of law and state, the people who had causes depending complained loudly of the inconvenience they suffered in being necessitated to follow the king's suite from place to place to have them determined. A restoration of the ancient constitution, and particularly of the power of the county-court, the grand seat of justice in the *Saxon* times, whereof they had been unjustly deprived, partly by the policy, and partly by the force of the *Normans*, was now much wished for by the people. And though the dignity of the county-court was not only greatly diminished, but the matters usually disputed were become too intricate for the understandings of the suitors, yet, from the intolerable expence and delay occasioned by following the supreme tribunal, travelling about with the king's person, the chance of injustice seemed preferable to procrastination. In the reign of *Rufus*, the Conqueror's son and successor, it was found expedient to pare off some of the excrescences of the *Norman* regulations, by restoring in certain cases the laws of *Edward the Confessor*. The outline of the new constitution, however, was suffered to remain as in his father's time. In the reign of *Henry the First* some little alteration, with respect to the trial of causes in a more easy and expeditious manner for the subject, took place for a while. And in the following reign of *Stephen the Usurper*, though much was promised, little was performed towards redressing the numberless grievances of the people. But in the time of *Henry the Second* the laws were revised and methodized, and reduced into a regular order; and to obviate the inconveniencies

conveniences of following the supreme court, this prince, at the parliament of *Northampton*, established certain officers, called *Justices in Eyre*, *justiciarii itinerantes*; I say, established such justices, contrary to the old chronicles, which maintain that this prince first introduced them. For Mr. *Madox* * gives instances upon record of such justices going their circuits, so early as the eighteenth year of king *Henry the First*. And I follow his opinion in preference to that of the monkish writers, in consequence of lord *Coke's* advice not to mind *chronicle law*, when put in competition with *records*. Besides, lord *Lyttleton* seems inclined to think that such justices were first appointed in this island by king *Henry the First*, who had observed the great benefits derived to the people in *France* from a similar institution by *Louis le Gros*; and says, that during the intestine commotions under *Stephen* they had been disused, and were therefore only revived and regularly settled by king *Henry the Second*.

Justices in Eyre
established.

These new created judges at first went their circuits frequently, but were soon prohibited from going them oftener than once in seven years. This prohibition was probably owing to the jealousy of the barons, whose independent and hereditary jurisdictions were much infringed by this regular exercise of power, derived from the immediate authority of the sovereign. It was not long, however, before the barons, finding it necessary, in order to support their pretensions against the crown, to make some regulations in favour of the commons, stifled the jealousy they had formerly conceived against the *Justices in Eyre*, and expressly stipulated with their sovereign that they should be sent into every county once in the year to try certain actions, then called *Recognitions* or *Affizes* †. Affizes were remedies which had been introduced at the same parliament of *Northampton*, for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown, than before the suitors in the county-court, or the king's justiciars in the *Aula Regis*. The invention of this mode of trial, as well as that of the grand affize, or trial by a special kind of jury in a writ of right, at the option of the tenant or demandant,

Their circuits.

Affizes, what.

* *H. p. Scacc. c. 3.*

† *Vide Magna Charta, c. 12.*

instead

instead of the *Norman* trial by battel, are attributed to *Glanvil*, Chief Justiciar to king *Henry* the Second.

Justices in Eyre
had also com-
missions.

Extent thereof.

These *Justices in Eyre*, besides being empowered to take the assizes, were commissioned also by the king, or the guardians of the realm in his absence, to do justice of all kinds in their respective circuits, where the property in contention did not amount to half a knight's fee, or where the controversy was of that importance that it could not be determined but in the sovereign's presence. And if a matter of difficulty arose in taking the assize, these judges were afterwards directed to adjourn it, and cause it to be brought before the justices of the bench*. These itinerant magistrates were also charged to make inquisitions concerning robbers and malefactors in the counties through which they passed, and to take especial care of the rights and profits accruing to the crown from the reservations in the feudal grants. And at their first institution, they were directed to inquire of several matters which the preceding commissions had made necessary†.

Their power.

Appeal from
their decisions.

Wherever these justices came they superseded the *tourn*, and all matters civil and criminal were referred to their judgments; but still an appeal lay from their determination to the great *Aula Regis*. And if the King went into the county where they happened to be sitting, all pleas before them immediately ceased, and came into the sovereign Eyre before the Chief Justiciar.

Their further
jurisdiction.

Origin of feign-
ed issues;

In their circuits these *Justices in Eyre* acted also as auxiliaries to the supreme court; for whenever any matter of fact was strongly litigated by the contending parties above, and which arose at a great distance from the *Aula Regis*, there issued a writ, directed to the Chief Justice in Eyre, to inquire into the fact‡. From this circumstance we may perhaps look for the origin of the practice in the court of Chancery, of directing a feigned issue in law to try a fact strongly controverted between the parties in a suit there. Nor is it improbable, but that the legislature at *Edward* the First's second par-

* *Magna Charta*, c. 12.

† Vide *Lord Lyttleton*, B. 4. sub anno 1176, and the records cited from *Madex* in his Appendix, No. 11.

‡ Vide *Riley's Plead. in Parl.* 74, 75.

liament at *Westminster* took the hint from the like usage, to ordain, that pleas depending in either bench that required an easy examination should be tried in the county wherein the facts arose, before the justices appointed to take the assizes, by virtue of the writ given by that statute; from which has arisen the very beneficial jurisdiction of the auxiliary courts of *nisi prius*.

and of the
courts of nisi
prius.

Upon receiving a plea, if it was of a matter of fact, a jury was impannelled by the sheriff, who gave in their verdict to the *Justice in Eyre*, which was afterwards sent to the *Aula Regis* to be recorded. In debt upon simple contract, the defendant charged therewith might wage his law as in the Saxon times. But *wager of law* was never permitted, unless the defendant bore a fair and irreproachable character; and it was also confined to such cases where a debt might be supposed to be discharged, or satisfaction have been made in private without any witnesses to attest it; as in actions of debt on simple contract, or for an amercement in a court-baron, in actions of detinue, account, and on parol submissions to an award. For on all these occasions the action is built on a feeble foundation, and the law presumes that the party might either have discharged the debt in secret, or before witnesses that are dead or not to be found. In actions on *specialty* debts, witnesses were produced to attest the truth of the deed*. In *pleas of land*, the investiture thereof, signed by the *pares curia*, was produced to the court; but if that could not be found, the parties joined issue by *battel*, till that barbarous and absurd mode of trial fell into disuse, and the grand assize was introduced in its room. *Criminal matters and offences* were inquired of by an inquest impannelled, and presented on articles of inquiry, as in the Saxon times. But the old custom of putting the party accused to purge himself by the *ordeal*, or in lesser

How their
power was ex-
ercised.

Of the wager of
law.

In what cases
allowed.

Ordeal, &c.
abolished.

Petit jury intro-
duced.

* In those days a great difficulty attended the proving of a deed. For, according to lord Coke, they anciently added the names of the witnesses in the contents of the deed, after the clause of "*in cujus rei memoriam*," and impannelled them with the jury. This not only occasioned delay, from the necessity there was of awarding process to bring these witnesses in, but also from the cause being frequently obliged to be adjourned for their default. But to prevent this delay, and save the trouble and expence which attended it, *recognizances* were introduced; which being an acknowledgment of a debt in court, attested by the court itself, needs no other species of trial to make it more evident. Vide Co. Lit. 6. a.

offences

Distinction between them and grand juries.

offences by *compurgators*, was refused, and instead thereof a *petit jury* was introduced, to hear the evidence of the fact wherewith he was charged. And then the prisoner did not, as formerly, produce his witnesses to the *first* jury, who now only heard evidence to accuse, but reserved his defence for the *second* jury, before whom he was to be tried.—Hence arose the distinction between the *Grand* and *Petit* Juries.

Records of judges on circuits lodged in Exchequer.

When the *Justices in Eyre* returned from their circuits, they lodged the records in the *Exchequer*, from whence issued process to collect and gather in the fines and amerciaments due to the crown. But when the division of the courts took place, in the reign of Edward the First, the records were deposited in their respective treasuries, and only *extracts* thereof, so far as related to the revenue, were made out and transmitted to the Exchequer.

Writ of error and appeal from their judgments.

The *Justices in Eyre* having only a delegated power from the crown to hear and determine the causes referred to them, a writ of error and appeal lay from their judgment to the supreme court where the *Chief Justiciar* presided. This right of appeal brought back to that powerful magistrate the final determination of almost all causes of consequence, and occasioned not only a great delay of justice, but a considerable increase of expence to the parties. So great an influx of business to the supreme court, neither affording them leisure to hear nor opportunity to dispatch the causes referred to them with expedition and punctuality, soon occasioned a loud cry for the establishment of another jurisdiction, for the sole investigation of *civil* disputes. And as by this time the extravagant powers assumed by the *Chief Justiciar* had kindled a jealousy in the crown, and sometimes filled the nation with just alarms for its privileges, a diminution of his authority was in the contemplation both of the king and the people.

Origin of court of Common Pleas;

From the first appointment of this officer by the Conqueror, his power, notwithstanding parts of his jurisdiction had been diverted into other channels, had yet, from various circumstances, been continually increasing. But Mr. *Madox* thinks, that this increase of authority was rather owing to the personal dignity and consequence

owing to the multiplicity of business of Aula Regia;

consequence of those who had been successively appointed to the office, than to the extent of the jurisdiction allotted to it. In this, perhaps, he is not mistaken; for we find it to have been generally held by some great prelate, or powerful baron. And it appears that all the great offices of the *Aula Regis* were usually filled with the first personages in the kingdom; it being observed by our ancient writers, "that the splendour of the king's court appeared much in the greatness of his ministers; but that some were so great in themselves, that they diminished the grandeur of their master, and, by attracting the eyes of the multitude, made the king often entertain wishes to diminish that lustre, which so much exceeded his own." The frequent attempts of our princes to lessen the power and authority of the *magnates regni*, are very conspicuous in the subdivision of the great *fiefs*, which on escheats and forfeitures had been made; but which practice was soon put a stop to by the statute *de donis* *; however, not before some of them had received great checks in acquiring and perpetuating in their own families their extensive possessions.

and the great
power of the
Justiciar,

The diminution of the jurisdiction and authority of the *Chief Justiciar*, the object of our present attention, must certainly have been an essential part of the policy of the descendants of *Henry the Second*. But perhaps it was owing more to the assumed consequence and importance of the *Chief Justiciar* himself, than to any thing else, that this great office received the most severe and fatal blow to its authority—I mean by the erection of the court of *Common Pleas*, which seems to have been first separated from the *Aula Regis* in the time of *Richard the First*, though it was not confirmed and made stationary at *Westminster* till the seventeenth year of king *John*. In this opinion I follow *Mr. Madox*, although it must be acknowledged, that he differs from the authority of most writers on this subject, and amongst others of lord *Coke*, who in *Coke Lyttleton*, 71b. and in the preface of his eighth report, seems inclined to believe that the *Common Pleas* was not only a distinct court at the time of *magna charta*, but that there was a court of such peculiar and separate

which the so-
vereign wished
to check.

Antiquity of
court of Com-
mon Pleas.

* *Westminster the second*, 13 *Edw. 1.*

jurisdiction

jurisdiction even before the Conquest. Lord *Coke* as a lawyer, no doubt, merits our greatest reverence; but *Madox*, as an antiquary, is certainly deserving of our attention, and particularly in a matter of this sort, in which we cannot but suppose his researches to have been higher than those of his lordship. According to the antiquary, then, for some time after the Conquest, there was (as I have said before) but one great and supreme court, called the *Aula Regis*, exercising a jurisdiction over civil and criminal matters, from which gradually sprung the courts of *Exchequer* and *Common Pleas*; and as the former became altogether independent, so the latter became wholly distinct from it. He thinks too, that the separation of the *Common Pleas* took place in the reign of *Richard* the First, though it was not (as he * says) firmly established till that of *Henry* the Third. In this opinion the antiquary seems to be confirmed by some remarkable passages in the history of that reign, in which he lays the foundation of the *Common Pleas*, one of which in particular I shall advert to.

Its establishment greatly owing to the cabals of the Justiciar and great officers of state.

Amongst the various schemes put in practice by *Richard* the First, to obtain money to support his projects against the infidels, he forgot the policy which it was clearly his interest to pursue; and while he was intent only on that one object, neglected altogether the rights of his crown, and the welfare of his people. For we are informed, that he put up all the highest offices and titles to sale; and, amongst the rest, sold that of *Chief Justiciary* to *Hugh de Puzas*, bishop of *Durham*, for one thousand marks; which prelate was also rich enough to buy the earldom of *Northumberland*. When *Richard* afterwards set out on the knight-errantry of a *Croisade*, he entrusted the guardianship of the realm to this *Hugh de Puzas*, jointly with his favourite *Hugh de Longchamp*, who held the bishopric of *Ely*, the office of chancellor, and who was also the Pope's legate. Whether *Puzas* conceived, as he had bought the office of *Chief Justiciar*, it was an infringement on the rights of his purchase to put another in commission with himself in the viceroyship of the kingdom; or whether it was owing to the jealousy or ambition of *Longchamp*, it is certain, that the instant the King was gone on his pro-

* *Vide Madox*, *Excheq.* on the division of the courts.

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ject, these joint guardians, from their quarrels, threw the whole kingdom into a flame. In their contentions *Longchamp* got the better of *Puzas*, and not only compelled him to resign all his offices, but usurped that of *Justiciar* himself, and sent *Puzas* to prison. *Richard's* time was so much taken up with the Saracens while abroad in the Holy Land, that, notwithstanding these commotions reached his ears, he took no step to deprive *Longchamp* of the authority he had usurped; but suffered him to continue for some time in the full enjoyment of his offices: till at last his insolence and oppressions roused up the barons, who, under prince *John*, met at *Reading*, and not only stript him of his usurpations, but compelled him to fly; and gave the office of *Chief Justiciar* to the archbishop of *Rouen*.

If then we consider the several great offices vested at one and the same time in *Puzas* and *Longchamp*, the kingly authority which they possessed, and the deep schemes of ambition in which by their rivalry they were engaged, we cannot think that either of them when in possession of the office of *Chief Justiciary* wished for the *Aula Regis* to hold a long session; or that they had any great inclination, or much leisure, for the hearing and investigation of private matters referred to them. To their cabals and ambition then, more than to any thing else, we may look for the first separation of the *Common Pleas* from the *Aula Regis*; as in all probability, to save their own trouble and time, they delegated the cognizance of civil concerns to others of the *Justiciars*, who, for the better hearing thereof, and that they might not protract the session of the *Aula Regis*, left the High Bench and retired into some convenient apartment to hear those pleas, which being merely civil, and more technically intricate, required a more private discussion. Nor did the *Chief Justiciars* think they were parting with their authority for ever, by such temporary delegations of it; as they reserved to themselves the power of resuming it whenever they chose, and an appellate jurisdiction to rectify any erroneous proceedings in the causes referred to their substitutes: But the nation having once experienced the benefits arising from this newly-constituted jurisdiction, loudly called for its permanent establishment; and the Barons dreading the resumption of the power of the *Chief Justiciar* in its full latitude,

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By delegating their civil jurisdiction and separating the trial of causes from the *Aula Regia*.

The convenience of which was felt;

and insisted
upon to be con-
tinued.

This court was
fully established
by the Magna
Charta,

and rendered
immoveable,

at Westminster.

Called also Com-
mon Bench,
why.

and glad to see it once diminished, joined in the voice of the Commons. Accordingly, in the succeeding reign of king *John*, when he, to quell the insurrections of the great feudatories, consented to the two famous charters of English liberties, *magna charta*, and *carta de foresta*, the barons took care to provide, amongst other things equally calculated for the relief and protection of the subject, that this court for the investigation of the civil concerns of the people should be fully established. With this article that unfortunate prince did not long hesitate to comply, having himself experienced many inconveniences in the earlier part of his life from the supereminent authority exercised by the *Chief Justiciars*, whose tyranny had extended itself, as well over the prerogatives of the king as the rights of the people: and so much so, that he himself had once formed a design to abolish the office, but which unfortunately proved abortive, from the great ascendancy which that magistrate had gained in the country. The barons therefore from their dislike of the office, under the pretence of relieving the people from the inconveniences of following the *Aula Regis* from place to place to have their causes determined, made it an article in the great charter, that "*Communia placita non sequantur curiam nostram, sed in aliquo loco certo teneantur.*" This article effectually established and confirmed the *Common Pleas*; and the *loco certo*, where these pleas were to be heard and determined, was fixed to be in a recess of the Great Hall of the Palace at *Westminster*, built in the time of king *Rufus*, where the sovereign usually resided. The *Common Pleas* has * mostly since that time remained in the same place, while the court of the *Chief Justice of England*, which afterwards sprung from the old root of the *Aula Regis*, continues ambulatory with the sovereign.

By the establishment of the court of *Common Pleas* or *Common Bench*, as it was styled to distinguish it from the *High Bench*, whereon the *Chief Justiciar* sat as representative of the sovereign, this magistrate was intirely stripped of another considerable branch of his jurisdiction;

* I say mostly, contrary to the opinion of many, who affirm that it has ever since remained there; for by the statute 3. c. 12. it appears, that the *Common Bench* had been removed; and that statute provides, that it shall not hereafter be removed without warning given the suitors.

and his power was so much curbed by other articles in the Great Charter, ratified and confirmed by king *Henry the Third*, that we behold this mighty officer gradually on the wane, during the long and troublesome reign of that king: towards the end of which there appears to have been no such magistrate; for the last *Chief Justiciar* we read of in history, and it is even doubted whether he was *Chief Justiciar* or not, was *Hubert du Burgh*. The court too, in which this magistrate used to preside, seems by this time to have lost its name of the *Aula Regis*, though whether it assumed the name of the *King's Bench* or not, till the succeeding reign of *Edward the First*, does not appear. For *Bracton*, who wrote towards the close of the reign of *Henry the Third*, and was *Chief Justice*, speaking of the remaining jurisdiction in it, says, "*Habet Rex plures curias in quibus diverse actiones terminantur, & illarum curiam habet unam propriam, sicut Aulam Regiam, & Justiciarios capitales, qui proprias causas Regis terminant, & aliorum omnium per querelam, vel per privilegium, seu libertatem.*" And afterwards, speaking of the Judges, he says, "*Item Justiciariorum quidam sunt capitales, generales, perpetui, & majores a latere Regis residentes, qui omnium aliorum corrigere tenentur injurias & errores.*"

Great abridgment of Justiciar's power.

Office abolished.

Aula Regia, now called the *King's Bench*.

Originally only a criminal court, and court of appeal.

Besides the establishment of the *Common Pleas*, the *Aula Regis*, during the reign of *Henry the Third*, had received other considerable shocks, particularly that of the chancellor's withdrawing from it, and exercising his judicial authority alone in a separate apartment. But the precise time of the chancellor's secession is not well ascertained, though there is great reason to think it took place in the course of that reign; and that it was owing to the intestine commotions and disputes which happened, not only between the king and the barons, but between the *Magnates Regni* themselves when assembled together, which wholly prevented the chancellor from performing the ordinary functions of his office in the Great Hall of the Palace, where the sovereign for the most part resided.

Before this the chancellor had seceded from the *Aula Regis*.

The jarring interests that prevailed between the greater barons and the less, when convened together,

* These words clearly shew, that the *King's Bench* originally was no other than a criminal court, and court of appeal.

Improvements
in our legal po-
lity, made by
Edw. I.

had long called for their separation. In the reign of King *John* they had for a while been disunited; for the first traces which remain of their separation, in the constitution of parliaments, are found in the great charter obtained in his reign; though omitted in that of his son *Henry* the Third, in whose troublesome reign they again clashed with each other. The continual dangers to which the king and people were exposed from the factions and contentions of these great feudatories when assembled, and it not being well settled what distinct powers the assembly of the great or lesser barons should severally exercise, or where the extensive authority vested in the *Aula Regis* should reside, seem first to have suggested to young *Edward*, who had subdued the potent barons, the great idea of our juridical constitution; which he afterwards, upon his coming to the crown, with so much credit to himself, and happiness to his subjects, firmly established. This prince has been styled our *English Justinian*; for in his time the law came to so sudden a perfection, that Sir *Matthew Hale* does not scruple to affirm, that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together*.

Supreme court
of Parliament.

King *Edward's* establishment of the constitution consisted, instead of one court of universal jurisdiction possessing a legislative as well as a judicial authority, and exercising a superintendent control over subordinate jurisdictions, of one supreme court called the *Parliament*, composed of the sovereign himself, the tenants *per baronium*, and the representatives of other inferior tenants holding *in capite* of the crown; and after the twentieth† year of his reign of the representatives of

* Vide a summary of the improvements made by this prince, 4 *Blackst. Com.* 425-6-7. ; and *Hale's Hist. Com. Law.*

† I have assigned, according to Mr. *Hume*, the 20th year of his reign, 12th Jan. 1269, as the true epoch of the establishment of the House of Commons. For though there are still extant, writs from the 49th of *Henry* the Third, to summon as well knights, citizens, and burgesses to Parliament, yet this was but owing to the sedition of the Earl of *Leicester*. But when *Edward* the First had got the better of him at the battle of *Leirwa*, the burgesses were never summoned from that time till the 20th of *Edward* the First; from which period, with a few interruptions, the constitution of the House of Commons appears to be regular, though the division, as we find it at this day, did not take place till some time after. Vide Mr. *Hume*, 2 vol. 210. and 1 *Rym. fol.* 802.

the cities and burghs. In this court was vested the sole right of legislation, and the exercise of an appellate jurisdiction in the *dernier resort* over all causes civil and criminal, unless of ecclesiastical cognizance, which had before been given to the bishops; but which was only to assemble when summoned by *writ*. The residue of the jurisdiction of the old *Aula Regis* he branched out into different courts*, which were called the *superior courts of common law*, and the *king's courts for maritime and military concerns*. He defined the limits of their several jurisdictions, so as not to interfere one with another. To each of them he assigned justices; and in that assignation seems to have had a particular reference to the peculiar provinces of jurisdiction exercised by the great officers respectively who composed the *Aula Regis*. And he reserved to one of these superior courts (that being the court in which he himself presided, and thence styled the court of *King's Bench*), all such power as was not parcelled out to the rest, and which according to ancient custom was to follow his person in his royal progresses through the kingdom. In this court sat, as representative of the sovereign, the successor of the *Chief Justiciar*, but invested only with the tatters of his authority, whose title was now changed to that of *Chief Justice of England*, constituted by the *King's writ*; while the other judges of the superior courts were all appointed by *patent*. With the change of his name, this magistrate lost his pre-eminence over the chancellor of England, which the *Chief Justiciar* had always retained.

Appellant jurisdiction.

Other alterations in jurisdiction of the *Aula Regis*.

Power of *King's Bench*.

Office of *Justiciar* now supplied by *Chief Justice of England*; his power.

* Lord Hale, in his *Analysis*, has accurately divided courts into such as are of record, and not of record. The former he subdivides into supreme, superior, and inferior. The supreme is the high court of Parliament. The superior he again subdivides into those that are more principal, as the *Lords' House of parliament*, the *Chancery*, *King's Bench*, *Common Pleas*, *Exchequer*, the courts of the *justices itinerant*, *ad communia placita* & *ad placita foreste*. The less principal, he says, are the courts of *Bank-delivery*, *Oyer*, *Terminer*, *Affize*, *Nisi-Prius*, and *Palatine*, courts of *commission of sewers*, and courts of *justices of the peace*. While he comprises, under the term of inferior courts of record, *corporation courts*, *courts-leet*, *sheriffs torn*, &c. And courts not of record, he says, are *courts-baron*, *county courts*, *hundred courts*, *admiralty* and *ecclesiastical courts*. And all these (he continues) are bounded and circumscribed by certain laws and stated rules, with which all their judicial proceedings and determinations must square. *Vide* Lord Hale's *Analysis*, which, though little read at this day, on account of the excellent *Analysis* of Sir William Blackstone, still highly merits the attention of the student.

Chancellor, his jurisdiction;

as to issuing writs;

as being king's chaplain;

as respecting patents;

as to inquests of office;

To the chancellor, on this division of the courts, was committed the custody of the great seal of England; and, as a consequent thereto, the power of issuing all the king's original writs, whether directed to the supreme, superior, or subordinate jurisdictions. The chancellor therefore sat in a distinct court to hear reasons, why certain writs that were not of course should issue, and by his *fiat* alone the clerks were empowered to make them out. These writs were called *Brevia de Cancellatâ*, in contradistinction to the others, which were denominated *Brevia de Cursu*, and issued on paying the usual fees for them. To the chancellor also, as the king's chaplain, appertained the custody of his conscience, or, in other words, that jurisdiction which must necessarily reside somewhere in every state, which makes pretension to independent privileges, to redress such injuries as the subject may suffer from the more immediate and personal acts of the sovereign. When the king therefore had granted any property or privilege to a subject by *patent* (which was and still remains the only method of transmitting any property or conferring any privilege by the crown), as the same passed under the great seal in the chancellor's custody, this officer had, when the grant was either prejudicial, improper, or forfeited, a right to hold plea thereof by a writ of *scire facias* returnable before himself; and if upon the hearing it was found proper to be repealed, to give judgment*, "*quod predicta litera patentes Domini Regis revocentur, adnullentur, & vacua & invalida pro nullo penitus habeantur & teneantur, ac etiam quod irrotulamentum eorundem cancelletur, cassetur, & adnihilentur.*"

When the sovereign also, upon any inquiry made by his officer, sheriff, coroner, or escheator, *virtute officii*, or by writ sent for that purpose, or by commissioners specially appointed, became entitled to lands or tenements, or goods and chattels, to the chancellor's jurisdiction were assigned (when the record thereof was transmitted) all such pleas as might arise thereon upon any claim of a subject: it being an unquestionable privilege from the earliest times, for any one to come in and traverse or deny the sovereign's title. This power of traversing *inquests of office*, as they are called in our

* 4 Infit. 88. Bro. Sci. Fa. pl. 69. pl. 185.

law books, in cases where a party is aggrieved, has since been farther extended by several statutes made in the reigns of *Edward* the Third and *Edward* the Sixth, by which the remedy is become universal in cases where the subject before was driven to his *petition of right*.

To the chancellor also, by the illustrious *Edward*, was given a new jurisdiction to redress further injuries affecting the subject from the inadvertence or misconduct of the sovereign; this was by the invention of that universal remedy for such matters, called the *petition of right* *. Before this time, the subject had but two remedies against the crown, the one the *traverse of office* already mentioned, the other a *monstrans de droit*. This latter was the proper remedy in cases where the subject's title appeared by record to be of as high a nature as the king's. But as there were injuries by which the subject might be affected from the mere act of the crown, and where his title might not appear of as high authority as the king's, or where he could not come in and traverse the record, this prince, in the plenitude of his justice, introduced the *petition de droit*. This was the proper remedy therefore, when the king was in full possession of the hereditaments or chattels, and the one could suggest a right to the same, at once controverting the king's, and grounded on facts alleged in the petition itself. The process adapted to the pursuit of this remedy was as follows: on presenting the petition to the king, it was indorsed by him, *soit droit fait al partie*, and delivered to his chancellor, who issued a commission from the office of the *Petty Bag*, to inquire into the truth of the allegations, unless that trouble was saved by the confession of the king's own attorney. If the commission went, and the title was found by the inquest of the king†, a second commission might issue, and even a third, to give the petitioner an opportunity to establish his claim. But if title was found to be in the subject‡, there issued another writ before he could interplead with his sovereign, to inquire also into the king's. And the reason of it was, that if a verdict on trial was given for the party, the king was concluded

as to petitions of right.

Monstrans de droit; its defects.

Petition de droit;

how proceeded on.

* *Vide* 33 *Edw* 3. fol. 3. quoted in *Bro. Prerog. de Roi*, pl. 2.

† *Stamf. Prerog.* 73. a.

‡ *Ib.* 73. b.

for ever—The judgment being, *quod manus Domini Regis amoveantur & possessio restituatur petenti, salvo jure Domini Regis**: which last clause is always added to judgments against the king, to whom no *laches* is ever imputed, and whose right (till some late statutes†) was never defeated by any length or limitation of time.

Chancellor's jurisdiction over officers of his own court;

but could not try matters of fact, why.

When tried.

The chancellor had also jurisdiction given him over all civil matters (except pleas of land), wherein any officer of his own court was immediately concerned, and also of recognizances taken before him. But if any fact was disputed either on the *scire facias*, *traverse of office*, or the like, and issue was joined thereon, the chancellor was not permitted to try it: for as he had the power of issuing writs, he was prohibited from trying matters of fact, lest he should become as powerful as the *Justiciar* had been before; and, if he had been suffered to try facts, he could easily have overturned the whole juridical system established by King *Edward* the First, and the common law itself, by making out new writs returnable before himself, and giving unprecedented judgments thereon. Therefore in no case, when facts were controverted in Chancery, was the chancellor permitted to try them, but was obliged to deliver the record *propria manu*, into the court of *King's Bench*, from whence issued process to the sheriff to impanel a jury, whose verdict when taken was indorsed on the record, and returned to the chancellor.

A jurisdiction over these several matters seems to have been all that was originally assigned to the chancellor by our *English Justinian*; and though at this day it may appear to have been a very confined one, yet when we turn our eyes to the situation of things in those days, and recollect that this officer was usually a bishop, and first minister of the country, we cannot but think his forensick avocation as chancellor afforded sufficient employment for those hours which were not taken up with the labours of the statesman, or devoted to the duties of the prelate. /

Chancellor's power increased.

The occurrence of circumstances since the days of *Edward* the First, has given this court that great influx

* 2 *Instit.* 695. *Fines*. l. 460.

† 21 *Jac.* 1. c. 2. 9 *Geo.* 3. c. 16.

of business, and accession of power, which it enjoys now by *English bill*, similar to that sort of jurisdiction which the court of *Exchequer* drew into it, and still retains. But the peculiar jurisdiction by *English bill* for matters of equity, exercised by the chancellor, seems to have arisen in the following manner. In the *Roman law* there was such a thing as an *usufructuary* possession, as distinguished from the thing itself; and when the emperor *Justinian's* pandects were discovered by the monks at *Amalfi*, they were studied with great avidity by the *Romish* clergy, from which they derived the notion of *uses*, and introduced them into this country. For when by the statutes of *mortmain* they were prohibited from purchasing lands in their own names, or from getting possession thereof by a feigned recovery of them in a real action, or by their own inventions, they introduced the custom of having the lands conveyed to their use. These conveyances being regarded in those days as a matter of conscience in the *feoffee to uses*, *John de Waltham*, who was chancellor to *Richard the Second*, by a strange interpretation of the statute of **Westminster the second*, devised the writ of *subpœna*, and made it returnable before himself, to make the *feoffee to uses* accountable to his *cestuique use*. From this scheme the clergy derived great advantages for a while, till afterwards the statute 15th of *Richard the Second*, chap. 5. declared such taking to *uses* to be within the compass and purview of the statutes of *mortmain*, and such feoffments were amortized accordingly. But this process of *subpœna* returnable in Chancery, having been once introduced, it was afterwards extended to a variety of other cases in that court, and is now become universal. In an ancient treatise intitled *Diversité des Courts*, which *Sir William Blackstone* thinks was written in the sixteenth century, there is a catalogue of all matters then cognizable by the *subpœna*. The process of *subpœna* also soon found its way into the court of *Exchequer*, and came to be used there on the equity side of it, as the fundamental and operative process to bring the parties into court; and from the same root have sprung many bastard slips of *equitable* jurisdiction in the counties palatine, and other royal franchises in different parts of the kingdom. Having said thus much of the jurisdiction

Proceeding by
English bill,
how introduced.

Of the sub-
pœna;

which soon
found its way
into Exchequer.

* 13 of *Edw. 1.*

tion of the court of Chancery, and of those matters which were assigned to the chancellor on the division and establishment of the courts by our *Edward the First*, I shall next proceed to shew what sort of jurisdiction he permitted the *Chief Justice of England* to retain and exercise in the court of *King's Bench*.

Power and jurisdiction given to King's Bench by Edw. 1.

To the *King's Bench*, on the distribution of the power of the *Aula Regis*, was allotted a twofold jurisdiction; —the one over all pleas of the crown not relating to the revenue, —the other over such matters between subject and subject as favoured of a *criminal* nature. Of criminal matters or pleas of the crown it retained a supreme original jurisdiction, and was termed the *custos morum* of the people; as, upon hearing of any offence militating against the first principles of justice or morality, it was empowered to inflict a proper punishment for it, and for that purpose might issue process returnable before itself.

Pleas of the crown,

and power over all courts of criminal jurisdiction.

Extent thereof.

The *criminal* matters therefore of which it had cognizance were of all kinds; but they were divided into crimes and misdemeanors, properly so called, and into pleas relating to franchises and liberties. As to crimes and misdemeanors, it had a jurisdiction assigned it over every species thereof, from high treason down to the most trivial trespass; and it had also a controlling power given it over all courts of criminal jurisdiction then in being, or that might be established. Over such as proceeded according to the common law, by *writ of error*, or *certiorari*; and over such as proceeded in a summary way, or in a course different from the common law, by *certiorari* only, unless specially prohibited by the statute establishing such summary or extraordinary jurisdiction. If a matter came into this court by *certiorari* before trial, the *King's Bench* might summon a jury, and try it at bar; and since the statute of *Westminster the second*, may award a *nisi prius* to try it in the country, with the consent of the king's own attorney. And this court retained so much of the criminal jurisdiction exercised by the *Aula Regis*, that, upon its removal with the sovereign, it *ipso facto* suspended, if not entirely put an end to, all criminal proceedings before any other tribunal.

With

With respect to matters relating to franchises and liberties, if any subject or body politic had usurped any franchise or privilege, this court issued the *writ of quo warranto*, or received an information thereon filed *ex officio* by the proper officer of the crown, or filed such information on their own authority upon facts disclosed in the affidavits of private persons, provided there appeared sufficient ground for their extraordinary interposition. If the usurpation upon the trial was found unlawful, the party was ousted, and the franchise, if capable of seizure, seized into the king's hands. Also in cases where otherwise justice was obstructed, or the king's charter neglected, in the reign of *Edward the First*, was established a remedy, at this day frequently in use, called a *mandamus*. This writ was framed to command and compel inferior courts, corporations, and magistrates, to do that justice which in duty they were bound to perform. A *mandamus* is a *writ of right*, as some have imagined, founded on *magna charta*, though no instance has been traced of its having issued earlier than the reign of *Edward the First*; but the court is bound to grant it, if applied for, without imposing any terms on him who demands it. Also when inferior courts exceed the jurisdiction assigned them, this court had the power given it of issuing the *writ of prohibition* to stop any further proceedings, as being then *coram non iudice*. And if any subject was illegally confined, he was entitled to the prerogative *writ of habeas corpus*, issuing by the common law out of this court in term-time, or grantable by one of the judges thereof in the vacation. All which seem to have been the principal points of the *criminal* jurisdiction of this superior court, as allotted to it by king *Edward the First*.

Usurpations of offices, &c.

by *quo warranto*;

or neglect of charters, &c.

by *mandamus*.

Nature thereof.

Or excess of jurisdiction,

by prohibition;

or illegal imprisonments, by *habeas corpus*.

As to the *civil* branch of its jurisdiction, that originally was very narrow indeed, though at this day it ingrosses most of its attention. For as a court of primary jurisdiction, it had only cognizance of injuries alleged to have been committed *with force*, or in which the defendant was charged with falsity or deceit. Injuries committed with force were all *trespasses vi et armis*, and others of the same nature, as *ejectment*, *replevin*, *rescous*, *pound-breach*, and *forcible entry*. And those wherein the defendant was charged with *falsity* or *deceit*, were remedied by *writs of conspiracy*, *deceit*, and the

Civil branch of jurisdiction,

confined to offences of a criminal nature.

It was a court
of appeal.

Its process may
run to any part
of king's do-
minions.

Common Pleas,
its power and
jurisdiction

over all civil
offences,

the like; for in all these cases the defendant was liable to pay a *fine* to the Crown, as well as damages to the party complaining. In what manner the court of *King's Bench* obtained cognizance of the various civil actions it now holds plea of, will be seen in the next note; but it must be remembered, that this court was also constituted a court of *appeal* from the *Common Pleas*, and other inferior courts in the kingdom; and that a *writ of error* also lay in it till the 22d & 23d of George the Third from the *King's Bench* in *Ireland*, and it also lies in those cases where the chancellor proceeds according to the course of the common law, as upon *petition de droit, monstrans de droit, traverse of office, scire facias* to repeal letters-patent, or on *recognizances*, and *executions upon statutes*. And from this court, as being the superior court of the Lord Paramount, all prerogative process whatever issues to any place which has been, or may hereafter become, a part of the dominions of the Crown; and therefore when King *Edward*, by the conquest of *Wales*, had added that country to his dominions, the *King's Bench* had jurisdiction in *Wales*. When that king had also established his claim as Lord Paramount over the king of *Scotland*, the court of *King's Bench* actually sat at *Roxburgh* there, and afterwards summoned the *Scottish* king and his vassals to appear at *Westminster*. So at this day it has a jurisdiction over the *Isle of Man*, the *Norman isles*, and the plantations, by its prerogative writs; but with *Scotland*, *Ireland*, or the private dominions of the sovereign, as *Hanover*, it has nothing to do*.

The court of *Common Pleas*, which had been perfected and established by *magna charta* at *Westminster*, was next in authority to the *King's Bench*; and as it was erected solely for the investigation of the civil concerns of the people, has very emphatically been styled by Sir *Edward Coke*, The *Lock and Key* of the *Common Law*. By King *Edward's* plan in this court, all causes whatever, amounting to *forty shillings* and upwards, of a civil nature between subject and subject, were intended to be decided. For here not only all *real* actions, unless where the king himself was a party, who might sue in any of his courts, but also all personal and mixt actions were

* Vide *Burr.* 4 pt. 350.

to be prosecuted; though in some personal and mixt actions the King's Bench had a concurrent jurisdiction assigned it, as in *trespass vi et armis*, *replevin*, *ejectment*, and the like: these favouring of a criminal nature, and in which the defendant was formerly liable to pay a fine to the king. The *Common Pleas* had also a jurisdiction given it over causes originally commenced in inferior courts, and at the instance of one of the parties, sometimes upon shewing cause to the court, at others without shewing any cause at all, was empowered to award process, as the writ of *pone*, *recordari facias loquelam*, *accedas ad curiam*, and *false judgment*, to remove the proceedings. But it seems that it had not the power to investigate errors in a judgment of a court of record, though some lawyers of eminence have supposed that jurisdiction belongs to it. This court too, as being one of the king's superior courts, was authorized, upon a suggestion made in term-time, that an inferior court, whether temporal or ecclesiastical, was exceeding its jurisdiction, or holding plea of matter not cognizable by them, to award a *prohibition*, though no original plea was therein depending. This right of the *Common Pleas* to grant *prohibition* was solemnly discussed and allowed by all the judges of *England**; and *Vaughan*†, Chief Justice, acknowledged such jurisdiction to belong to it. To this court appertained, as it did also to the court of *Exchequer*, the right at common law, where any suitor of it was imprisoned, to grant the writ of *habeas corpus*; and if he was illegally detained, to discharge him: but if it appeared that he was confined for a criminal matter, neither this court, nor the court of *Exchequer*, could proceed to investigate the charge, but were bound to remand him; or else, if the offence was bailable, to take bail for his due appearance in a court of criminal jurisdiction‡. And the *Habeas Corpus* act§, for the better securing the liberty of the subject, provides, "That it shall be lawful for any prisoner to move and obtain his *habeas corpus*, as well out of the high court of Chancery or court of *Exchequer*, as out of the court of King's Bench or *Common Pleas*, or either of them; and if the said lord chancellor or keeper, or any judge or judges, baron or

or of a mixed nature.

Of removing proceedings from inferior courts.

Not a court of error;

but may award prohibition;

or *habeas corpus*.

* *Mish. 7 Jac. 1.*

† See *Wood's case*, 3 *Will.* 172.

‡ Vide *Vaugh. Rep.* 157. 4 *Inst.* 99.

§ 31 *Car. 2. c. 2. s. 10.*

"barons, for the time being, of the degree of the coif,
 "of any of the courts aforesaid, in the vacation-time,
 "upon the view of the copy of the warrant of commit-
 "ment or detainer, or upon oath made that such copy
 "was denied, shall deny any writ of *habeas corpus* by
 "the said act required to be granted, being moved for
 "as aforesaid, they shall severally forfeit to the prisoner
 "or party grieved the sum of five hundred pounds."

Court of Ex-
 chequer, its
 power.

How divided.

Of the court of
 appeal esta-
 blished by Ed-
 ward 3. in the
 Exchequer-
 chamber.

Use thereof.

Of another
 court of appeal
 established also
 in the Ex-
 chequer-cham-
 ber,

The jurisdiction of the court of *Exchequer* has been already discussed, as the establishment of it took place long before the reign of *Edward the First*, though he certainly new-modelled it, when defining and ascertaining the jurisdiction of the superior courts on the division of the power of the great *Aula Regis*. In his time we find the court of *Exchequer* divided into the court of *Pleas*, the court of *Receipt* (which is the true center into which the sovereign's revenues and profits ought to fall), the court of *Accounts*, and the court of *Equity* in the *Exchequer-chamber*, composed of the lord treasurer, chancellor of the *Exchequer*, and barons. To these courts *King Edward the Third* added another, composed of all the judges of *England*, held on account of some difficulty started in a point of law; the jurisdiction of which arises, when the judges of the respective courts of *King's Bench* and *Common Pleas* are equally divided in opinion, or apprehend great difficulty in a case. Whenever this happens, they are directed by the statute 14 *Edw. 3. c. 5.* to adjourn the matter into the *Exchequer-chamber*, to have it argued by all the judges of *England*. Before this statute the record in such cases was adjourned and determined in parliament, which was attended with great inconvenience; but however the same statute ordains, that if all the judges in the *Exchequer-chamber* are equally divided, it shall be determined at the next parliament by a prelate, two earls, and two barons, with the advice of the lord chancellor, and treasurer, and others of the king's council*.

In the same reign a court of appeal was also instituted in the *Exchequer-chamber*, for the examination of errors in the *Exchequer*, by the statute 31 *Edward the Third, c. 12.* Before the establishment of this court, errors

* See 4 Inst. 68. 110. Co. Lit. 72. b. and 2 Bulf. 46.

in the Exchequer had sometimes been examined before commissioners appointed by the Great Seal, and sometimes in parliament; the uncertainty of which became a considerable grievance to the subject, and therefore Parliament was petitioned, so early as 22d of *Edward the Third*, that the erroneous judgments in the Exchequer might be examined in the King's Bench; but this petition for some reasons was then disliked, and therefore not acceded to. But the legislature soon afterwards enacted, "That in all cases touching the king, or other persons, upon a complaint of error in the Exchequer, the chancellor and treasurer shall cause the record to be brought before them, and taking to them the judges and other sage persons, shall call before them the barons of the Exchequer to hear the cause of their judgment; and if upon examination error be found, they shall amend the rolls, and send them into the Exchequer to have execution." This statute however relates only to judgments on the common law side of the Exchequer, so that an appeal to this day from the equity side lies immediately to the House of Peers.

Use thereof.

In the reign of *Queen Elizabeth** another court of *Exchequer chamber* was established, for examining errors in causes originally commenced in the court of *King's Bench*, which, before that time, used to be examined in parliament. The practice of this, as well as of the other courts for the investigation of errors in causes commenced in the King's Bench and Common Pleas, hath been already treated of in the 20th Chapter of this work.

Another court of appeal established in Exchequer-chamber by *Queen Elizabeth*.
Use thereof.

To the inferior courts *King Edward* consigned a jurisdiction over all trifling actions, wherein the damage laid did not exceed forty shillings. For by the statute of † *Gloucester*, it was enacted, "That none should have trespass before the king's justices, unless he swears by his faith that the goods taken away were worth above forty shillings." The construction put upon this statute was, that it was only in affirmation of the common law, and the trespass intended was only trespass on the case, and that it could not mean trespass

Jurisdiction of inferior courts confined to actions not exceeding forty shillings.

Affidavit thereof.

* Stat. 27 *Eliz.* c. 8.

† 6 *Edw.* 1. c. 8.

with

No cognizance
of trespasses
vi & armis.

with force; because no inferior court was empowered to hold plea of trespass *vi & armis*. On this exposition of the statute of *Gloucester*, the case of *Lambard* and *Thurston* * seems to have been decided, which was an action of trespass, *vi & armis*, and damages laid to twenty shillings only: to which declaration the defendant demurred, and insisted, that the court of *King's Bench* had no jurisdiction, the damages alleged being under forty shillings. But to this objection the court answered, that if trespass *vi & armis* under forty shillings did not lie in a superior court, the party had no redress in such cases, because the fine † imposed in such action could not be set by an inferior court, meaning a court not of record.

Affidavit now
disused.

The affidavit required by the statute of *Gloucester*, previous to the commencement of an action in the superior courts, "that the matter in dispute amounted to forty shillings," has long since been disused in the *King's Bench* and *Common Pleas*, though in the latter, as well as in the court of *Exchequer*, it is still a frequent motion to dismiss the causes of such trifling account, as beneath the dignity of the court. The legislature however, willing to restore to the inferior courts that portion of jurisdiction originally intended by the common law, and confirmed by the statute of *Gloucester*, and of which they have been deprived by the disuse of the affidavit prescribed by that statute, has by a side-wind endeavoured to revive their consequence by the several statutes made to deprive the plaintiff of the costs of his suit, upon obtaining a verdict in case the damages found by the jury do not amount to forty shillings.

But trifling
causes dis-
couraged by
the different
acts establishing
courts of con-
science.

As to maritime and military affairs, and offences committed within the limits of the royal residence, which, with other matters, were cognizable by the *Aula Regis* originally, King *Edward* assigned them, on the division of the courts, to the peculiar superintendence of the marshal and constable, to whom they were before usually referred.

* *Cartb.* 108.

† The fine originally imposed in such actions is taken away by the statute 5 *W. & M. c.* 12. as being oppressive to poor defendants, who were liable to be outlawed for non-payment thereof, being a debt due to the Crown.

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APPENDIX (B).

Of the increased Jurisdiction of the Court of King's Bench over Civil Actions; their Process to bring the Defendant into Court, and of their Proceedings by Special Original, and the Fine payable thereon.

THE court of *King's Bench*, we have seen [Appendix A], had on its establishment, an original jurisdiction over all criminal offences or pleas of the crown, and of such civil matters only as were in breach of the peace, and therefore denominated *trespasses*. This appears plainly by the treatises of *Britton* and *Fleta*, who wrote in the reign of *Edward the First*, and who describe the jurisdiction of this court in civil matters to be, "to amend false judgments, determine appeals, and other trespasses committed against the peace, &c" *encontrer notre jurisdiction*," which is, says *Sir Edward Coke*, to grant *prohibitions*. Tied up to the trial of criminal offences and trespasses only, the investigation of the erroneous judgments of inferior courts, and the preservation of the due bounds and limits assigned to the respective jurisdictions instituted by the crown, this court found itself left with little or no business to engage its attention: so little indeed, that a few days in term-time sufficed to transact it; and as they did not sit *de die in diem*, continuances of all that was done in each separate matter before them, were entered from the day they sate, till the day fixed for their meeting again. From this small share of employment too, a great part was again taken off by the *Justices in Eyre**, of *Oyer and Terminer**, and *Gaol-delivery**, and the conservators of the peace in the country; to which justices in their circuits, the trial of all criminals in the respective counties through which they passed was referred. But it was not long before this court contrived to increase its jurisdiction in civil actions.

The court of King's Bench originally confined to criminal offences.

Little business.

* See the origin of these, Appendix O.

Soon contrived to increase it.

Causes thereof.

The necessity which had called for the establishment of a constant court in the capital, shewed itself more and more. The particular connexion formed with the continent, and the intercourse opened with other countries in *Europe*, had introduced a spirit of commerce amongst the people. Foreigners were permitted to resort here, and carry on trade, without molestation or hindrance. A speedier way for the recovery of debts had been instituted in the reign of *Edward* the First, by granting execution, not only upon goods and chattels, but also upon lands, by writ of *elegit*, which was of signal benefit to a trading people; and upon the same commercial ideas, former restraints upon landed property were taken off, and the charging it in a *statute-merchant*, to pay debts contracted in trade, was allowed, contrary to all feudal principles. [See *Appendix D.*] These improvements insensibly wrought a wonderful change in the manners of the people. Trade began to be embraced by those orders of men who had formerly looked upon it with an eye of contempt; and while the merchant and mechanic grew rich by the returns of their industry, the nobleman, by endeavouring to surpass the citizen in magnificence, was greatly impoverished, and his tenants oppressed from the slavish burdens imposed on their tenures. In this progress of society, litigations unavoidably increased; the contracts and engagements entered into in trade, the mutual credit necessarily required, the failures of some, and the dishonesty of others, together with the contrariety of opinions and constructions to which their engagements were liable, all conspired to open new sources of dispute. The multiplicity of causes, arising from these various circumstances, required a speedy investigation and dispatch; but the inferior courts were too circumscribed in their jurisdiction to hear and determine the far greater part of them. The parties, therefore, at first, were of necessity compelled to resort to the *Common Pleas* for redress; which occasioned a great disproportion in the business referred to the two superior courts: the one, having a sole jurisdiction over *civil* transactions, became fully employed; while the other, confined to *criminal* matters, pleas of the crown, and the keeping of inferior courts within their proper bounds only, found little or nothing to do.

Multiplicity of
business in C. B.

The

The court of *Exchequer* indeed had very early drawn some civil actions between subject and subject, not in the least relating to the revenue under their cognizance; and although the statute of * *Rutland*, and the statute of † *articuli super chartas*, were evidently meant to prohibit them in future from holding plea of any civil matter between the people, yet they retained the jurisdiction they had usurped in defiance of them, by conniving at the complainants *falsely suggesting* that he was a debtor to the king; which the plaintiff was not called upon to shew, nor the defendant allowed to dispute. But the judges of the court of *King's Bench* had not, from the particular jurisdiction prescribed to them, or the nature of their process, which we have seen was calculated only for *trespasses*, an opportunity of receiving complaint of any civil matter, or awarding process against the defendant, unless it was for a *trespass*; and therefore could not usurp an immediate jurisdiction over civil matters, as the court of *Exchequer* had done. However, it was not long before an opportunity offered itself of drawing an action, which was merely civil in itself, under their cognizance; and their jurisdiction over that being once established, other schemes were soon devised to enlarge it.

Court of Exchequer got cognizance of civil actions,

by fiction of quo minus.

Why court of King's Bench could not do this.

The common law had not provided an effectual remedy for many injuries to which the progress and extension of commerce gave birth. For the contracts made between merchants, and others in trade, were of such various sorts; and men were affected by non-performance of them in such different ways, and such new and consequential injuries arose, to which no writ in the register was properly adapted; that the legislature was forced to provide, so early as the 13th of Edward the First, that, "Whosoever from thenceforth in one case a writ shall be found in the *Chancery*, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in *Chancery* shall agree in forming a new one; and if they cannot agree, it shall be adjourned to the next parliament, where a writ shall

How they afterwards had an opportunity,

by the introduction of special writs in actions of trespass on the case;

* 10 Edw. 1.

† 23 Edw. 1. Stat. 3. c. 4.

" be framed by consent of the learned in the law ; lest
 " it happen for the future, that the court of our lord
 " the king be deficient in doing justice to the suitors."
 In consequence of this statute a variety of new writs
 were invented ; and a suitor who had received an injury
 to which no writ then in being was competent, had one
 made out for him according to the exigency of his own
 particular case. And the action founded thereon was
 called a *special action of trespass on the case*.

of which the
 King's Bench
 took cogniz-
 ance.

How extended
 to other actions,

by suffering de-
 clarations in
 other actions,

Of this sort of action the court of *King's Bench* con-
 tended they had cognizance, and that the *original writ*
 might, at the plaintiff's request, be made returnable, as
 well in that court as in the *Common Pleas* ; as the action
 was for a *trespass*, of which they had an original juris-
 diction : and though not alleged to be committed *vi*
& armis, yet *savoured* so much of a *criminal nature*, as
 to make the defendant liable to pay a *fine* to the king,
 as well as damages to the party complaining. Not con-
 tented with a participation of all actions *on the case* with
 the *Common Pleas*, the *King's Bench* contrived also, to
 share with them the actions of *debt*, *detinue*, *covenant*,
 and *account*. But as these actions were merely *civil* in
 themselves, the cognizance thereof could not be obtained
 in the same manner as the former, by procuring the
original writ to be made returnable there, nor could it
 have been maintained (if it had been attempted) in so
 plausible a manner as the action of *trespass on the case*.
 So that, to draw these into their court, they were
 obliged to resort to a fiction, in like manner as the court
 of *Exchequer* had done. This fiction was by suffering
 the plaintiff, after having alleged a complaint of *tres-*
pass against the defendant [in order to give the court
 jurisdiction], to waive his first charge of *trespass*, when
 the defendant was brought into court, and declare against
 him for a debt, breach of contract or covenant, de-
 tention of his goods, or other matter of a mere civil
 nature. And to support this new jurisdiction, the
 judges maintained, that when a party was once brought
 into court, and either in the actual or supposed custody
 of the *marshal*, he could not be charged, even for any
civil matter, elsewhere. By this doctrine, they not only
 got cognizance of that plaintiff's action who had caused
 the defendant to be apprehended, but also of the actions
 of

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 † 31

of others who had liberty to charge him while he remained in such custody *. And in order to found this jurisdiction, they held that it was not necessary that the defendant should be actually the *marshal's* prisoner, but the plaintiff might presume him to be so, since he was already amenable to the court: and on this presumption it is, that at this day, as soon as the defendant appears, or puts in bail to the process, he is deemed, by so doing, to be in such custody of the *marshal*, as will give the court a jurisdiction to proceed; it having been solemnly adjudged †, that if any person be *in custodia mareschalli*, &c. be it by commitment, or by *latitat*, bill of *Middlesex*, or other process of law, it is sufficient to give the court jurisdiction of any matter referred to them. And to vindicate this, Lord *Coke* says, "And the rather, for that the court of *Common Pleas* is not able to dispatch all the subjects causes, if the said actions should be confined to that court. And seeing none but serjeants at law can practise in the court of *Common Pleas*, it is necessary, that in this court of *King's Bench*, apprentices and other counsellors of law might by experience enable themselves to be called serjeants afterwards; otherwise, serjeants must want experience, which is the life of their profession." This acquired jurisdiction is now fully established. For, says the same learned writer, "The proceedings in the court of *King's Bench* for so long time, and under so many honourable judges, and reverend sages of the law, have gotten such a foundation as cannot, without an act of parliament, be shaken." Of such an act ever being passed there is not the least probability, since the legislature has, in several instances, confirmed its acquisition. Nor indeed can such an act ever be thought of, since not only the amazing increase of causes, from a wide extended commerce, requires more than one court to investigate and determine them; but the inconveniences formerly experienced by the frequent removal of this court, have long ceased to be apprehended, and the parties can carry on their cause with equal celerity and cheapness, and find the same justice done

on the supposition of defendant being in custody of the marshal.

This jurisdiction became established.

* Which is the foundation of the practice of delivering declarations by the *ty*, as it is now called.

† 31 Hen. 6. 10. b. 4 Inst. 72.

them on the one side of *Westminster-hall*, as on the other.

In this manner has the court of *King's Bench* obtained a concurrent jurisdiction, and now holds, as it were, a *divisum imperium*, with the court of *Common Pleas*, over all civil actions of a personal, and some of a mixt nature. Its *original* jurisdiction, we have seen, of causes between subject and subject, was only of such as were of a *tortious* kind, as all *trespasses*, *rescous* or *pound-breach*, actions of *deceit*, *conspiracy*, *forcible entry*, *ejectment*, *replevin*, and *trespass on the case*. Whereas its acquired jurisdiction, or rather that jurisdiction which is by consequence only, as being founded upon the defendant's being in the supposed or actual custody of the *marshal*, comprehends all actions of *contract*, whether express or implied, *debt*, *annuity*, *covenant*, *account*, *case for negligence*, *non-feasance*, *mal-feasance*, *mis-feasance*, and the like.

This jurisdiction nearly destroyed, by 13 Car. 2. requiring true cause of action to be in writ.

But this acquired jurisdiction had nearly met with a fatal blow, without any such intention of the legislature, in the reign of *Charles the Second*; when an act was passed*, requiring *the true cause of action to be expressed particularly in the writ or process*, otherwise the party arrested could only be held to bail for 40*l*. This act was made for the purpose of relieving defendants from being held to bail without knowing upon what ground, no cause being mentioned in the writ, and was not designed to affect the jurisdiction of the courts. But as the *King's Bench* had strictly only cognizance in matters of *trespass*, which word was necessary to be inserted in the process in order to give the court jurisdiction, and it was not till after the party had been so brought into court, and was supposed to be in their custody, that any other civil action as *debt* or the like could be brought against him; a difficulty now arose how this statute could be complied with, which required the real cause of action to be expressed in the writ, whereby the defendant was to be arrested (if to be held to bail for more than 40*l*.). And, indeed, there would have been an end of their investigation of civil actions of any considerable amount, if the court had not hit upon some ex-

How guarded against.

* 13 Car. 2. stat. 2. c. 2.

pedient

pedient to save their assumed jurisdiction from being overthrown and destroyed.

To their *bill or latitat*, commanding the sheriff to arrest the defendant to answer the plaintiff in a plea of *trespass* (provided the cause of action warranted the holding to bail in above 40*l.*), they inserted an *ac etiam* clause, specifying the true cause of action, in this manner: "And also, to a bill of the said *A. B.* for one hundred pounds of *debt* (or as the case happened to be) according to the custom of the court of our lord the king, before the king himself to be exhibited, and that he have then there this, &c." as the case was. By this device the statute was complied with, as the true cause of action was expressed in the process to warrant the defendant's insisting upon bail to above *forty pounds*, and the court still retained its jurisdiction, as the *civil matter* was suggested to be only a collateral charge, and not the cause of action for which the arrest was made—which was still the *trespass* supposed to have been committed, of which the court legally had cognizance.

Introduction of
the *ac etiam*.

Use thereof.

This curious device to retain their usurped jurisdiction over *civil actions*, which, if not suggested, was certainly connived at by Sir *John Keelynge*, the then chief justice of the *King's Bench*, occasioned a strong remonstrance from Sir *John Vaughan*, the then chief justice of the *Common Pleas*. For the judges and officers of the latter flattered themselves upon the passing of this act of *Charles the Second*, that the cognizance of all *civil matters* would again revert solely to their court; the true intent of the act being, as they contended, that there should be a proper *original writ* sued out at the commencement of the suit, in all actions *ailable*, and that the true cause of action should be inserted in it, and its subsequent process: and that the *King's Bench* must of necessity relinquish their usurpation over civil actions not amounting to a *trespass*; because their process of *bill*, which was founded on their original jurisdiction over injuries committed *contra pacem*, was calculated only for such as were denominated *trespasses*. Sir *John Vaughan* frequently endeavoured to dissuade the chief justice from the use of these *ac etiams* in his court, urging, that they were not only in face of the statute, but founded on an allegation (*viz. secundum consue-*

Disputed by C.
Just. of C. B.;

agreed to be
referred.

Umpirage de-
clined, and prac-
tice continued.

On what
grounds court
now exercises
jurisdiction over
the various civil
actions.
Original juris-
diction.

consuetudinem curie) that was false and contrary to law, there being no such custom to warrant them. But notwithstanding all that Sir *John Vaughan* could say against the use of them, the chief justice of the *King's Bench*, though without a shadow of argument, was obstinately determined not to surrender up the usurped jurisdiction of his court. At last, it was agreed between the two chiefs to discuss the matter before Sir *Matthew Hale*, then lord chief baron of the *Exchequer*, who should preside as moderator between them. This reference turned out very fortunate for the chief justice of the *King's Bench*; for his opponent, in his declamation against the unwarrantable use of these *ac etiams*, happening to go too far for his purpose, in contending that the cognizance of all civil actions of right belonged to the *Common Pleas* only, Sir *Matthew* perceived that such argument aimed as well at overthrowing the usurpations of the *Exchequer* as of the *King's Bench*; and that, if the *Common Pleas* reassumed its original jurisdiction, and the ancient boundaries were again set up between the courts, and neither the *King's Bench* nor the *Exchequer* were to interfere in personal actions between subject and subject, the *Common Pleas* would shine with all its former splendour, and leave the other courts with little or no business to engage their attention. Sir *Matthew* therefore begged to decline the umpirage, and left the two chiefs to settle their difference. Sir *John Vaughan* soon afterwards died, and from that time the practice has never been disputed.

Thus has the court of *King's Bench*, by continual usurpations (if the expression may be allowed), gradually regained that jurisdiction over civil transactions which the *Aula Regis* exercised of old, but which the *Common Pleas* was purposely formed to investigate, and ought strictly to have had the sole cognizance of.

It may be useful to the student, as a summary of what has been said, briefly to point out the ground upon which the various actions, in the court of *King's Bench* are now maintained. Of trespasses *vi et armis*, ejectment, replevin, deceit, conspiracy, and the like cases favouring of a criminal nature, they have cognizance by their original jurisdiction. Over actions of trespass on the case, they usurped an authority catching hold of the

the word trespass mentioned therein; but it was at first only a derivative authority, the original writs out of Chancery in such actions being made returnable in that court as well as in the Common Pleas, until the original afterwards grew into disuse. [See *Appendix, D.*] Over actions of debt, detinue, annuity, covenant, account, and the like, of a purely civil nature, they obtained jurisdiction by mere fiction; first by filing a bill for some ideal trespass in order to bring the defendant into the actual custody of the marshal (when we find he was amenable to all charges brought against him), and then declaring in such civil action, and afterwards by *supposing* him to be in such custody, and proceeding against him in such action in the first instance. In this way they also afterwards proceeded in actions on the case, and discontinued suing out the original. But this jurisdiction is only in such actions when the defendant is not to be held to bail; for where he is arrested, for any debt or the like, there the jurisdiction of the *King's Bench* hangs upon the subtle expedient of the introduction of the *ac etiam* into their process.

Derivative.

Fictitious.

Ac etiam.

It is for this reason that it has been doubted whether an action of debt, covenant, or the like, could be brought in the *King's Bench* by special original. And there is certainly some colour for the objection; for although such an original writ might be granted in cases where this court had original jurisdiction of their own, as trespass and the like, in which actions the parties might proceed by bill, or by special original out of Chancery returnable in *King's Bench*; and further, although in another species of action, namely trespass on the case, they had openly usurped a derivative jurisdiction, and such special originals out of Chancery were made returnable there; yet they never pretended to any such cognizance over debt or covenant, but only encouraged such actions by a fictitious and bye way of proceeding; and in former times all originals out of Chancery in such civil cases were returnable in the *Common Pleas*.

Of the objection to an original in debt in K. B.

But the jurisdiction of the *King's Bench* in this respect, by time, and the undisputed exercise of the right, is too firmly established to be now shaken. All personal and mixed actions (*real* actions being still confined

All actions now, by bill or original.

fined to the *Common Pleas*) may therefore, at this day, be prosecuted in the *King's Bench*, either by bill (the peculiar process of that court) or by special original out of Chancery. We proceed to shew the nature of this process by bill, and afterwards by original, and the reason why actions in both courts are now seldom brought by special original.

Of the Process to bring the Defendant into Court when the Proceedings are by Bill.

Supreme power
of K. B.

Original bill.

Bill of Middle-
sex.

A precept.

Effect thereof.

Return thereof.

The court of *King's Bench*, from its supreme jurisdiction over criminal matters, immediately upon its coming into any county (for it always followed the king), superseded the ordinary administration of justice by the general commissions of *Eyre*, and of *Oyer and Terminer*, and all parties who had received any injury, accompanied with force, had liberty to apply to it for redress. This was done by the plaintiff drawing out his complaint, and which must have alleged a trespass, and entering it on the records of the court, this was called the original bill, or bill of trespass. The clerk of the court then issued a peculiar species of process, intitled a bill of that county in which the court happened to be sitting, now called the bill of *Middlesex*, which is signed with the name of the chief clerk to enrol pleas in the court, namely, *Mansfield* and *Way*; and the words "By Bill" are subscribed, signifying that the action is by bill, and not by original; which bill was always first actually filed, and is still *supposed* to be filed. This second bill was directed to the sheriff of the county, the proper officer to execute the king's writs; but this was rather a *precept* than a writ, as it was not *tested*, which writs are. The sheriff was thereby commanded to take the body of the defendant, and have it on a certain day mentioned therein, in court, *wheresoever the lord the king should be in England*; for as the court was ambulatory, no certain place could be mentioned. If the sheriff apprehended him, he kept him in custody, and produced him in court on the return-day, it was at his peril to let him go at large. [See *Appendix D* and *E.*] He then made a return *cepi corpus*. But if he could not find him

in his county, he returned *non est inventus*; and another bill, called a *testatum* bill, issued to the sheriff of such other county where it was likely for him to be found, reciting the former bill and return, and commanding the sheriff of the latter county to take him; this afterwards was called the *latitat*; and instead of suing out the bill of Middlesex, it became the practice, for expedition sake, to sue out the *latitat* in the first instance, and to suppose that the bill had previously issued, the form thereof of reciting such bill still continued with a little variation as to the day when it was returnable; for as no such day existed in fact, it was dangerous to specify any; it stated it generally, therefore, at a certain day now past. If the defendant was not taken upon the *testatum*, an *alias* and then a *pluries testatum* issued, and so on, to the same effect as the *alias capias* and *pluries capias* at this day, if he is not taken upon the *latitat*. (See ch. 4. sec. 3. and also ch. 1. A.) If the defendant had fled into a liberty, and upon a warrant from the sheriff to the bailiff of the liberty nothing was done, the sheriff returned *mandavi ballivo, &c. et nullum dedit responsum*, and there then issued a writ to the sheriff, not to omit taking the defendant notwithstanding the liberty called a *non omittas* writ. When the defendant was taken, he was kept in custody till the return of the writ, he was then brought into court, and delivered over to the care of the king's marshal, earl marshal, or steward of the household, who had the custody of all the prisoners in the court of King's Bench, and detained them in the Marshalsea prison. From the office of earl marshal was derived that of the present marshal of the King's Bench prison, about the reign of James the First.

When the defendant was thus in custody, he was suffered to put in bail, to stand the event of the suit, at the discretion of the court, or was brought up from time to time by the marshal till the matter was finally heard and determined. The plaintiff then delivered his bill or declaration, which was nothing more than a copy of the original bill; and the defendant answered thereto, and the plaintiff replied, and so on, *ore tenus*, the whole of the proceedings being carried on *vivâ voce* in court; which practice continued till after the Reformation. [See Appendix N.] But from the 13th Edw. 1. the defendant

How if defendant not found.

Testatum bill.

Latitat.

Alteration therein.

Alias, pluries testatum.

Capias.

Non omittas.

How when defendant taken.

Of the office of marshal.

Declaration.

Proceedings ore tenus.

When attorney allowed.

was at liberty to attend the court by his attorney, whereas before that time he was obliged to be present in person.

Necessity of original bill on error brought.

How allowed to be filed:

It has been observed that it gradually became the practice, which still continues, of suing out the bill of Middlesex or *latitat* in the first instance, without any original bill, or bill of trespass, previously filed. But still it was *supposed* to have been filed; and the want thereof was cause of error, if a writ of error was afterwards brought. The court therefore, in order to protect such judgments grounded upon a fiction they themselves connived at, permitted the plaintiff, in case a writ of error was brought, to file his *bill* of complaint, and, if necessary, to get the precept or bill of Middlesex returned as if regularly done at first, provided he did it before errors were assigned, but not afterwards. And this is even now necessary, where a writ of error is brought after judgment by *default*, but not after verdict. The want thereof in the latter case being cured by statute of Elizabeth.

Of the Proceedings by Original in K. B. and of the Fine payable thereon.

It has been already shewn, that actions may be brought in the *King's Bench* either by bill, or special original out of *Chancery*. If the latter mode be adopted, the proceedings are the same as in the court of *Common Pleas*; the whole of whose jurisdiction is derived from such original writs, which are either actually, or supposed to be, sued out and returnable therein. [For the process therein, see *Appendix C and D.*]

Use of proceeding by original.

In some cases it is useful to proceed in this court by *original*: first, if the party absconds and the plaintiff wishes to outlaw him; for no outlawry lies upon any other process; and secondly, if defendant is likely to bring a writ of error; in which case he must, in the first instance, carry the record from this court to the House of Lords, which is too serious a matter merely for delay, whereas in proceedings by bill he may bring a writ of error in the Exchequer-chamber. See ch. 20.

The

The first case equally applies to the court of *Common Pleas*, but the last does not, as error lies from that court into the *King's Bench*. Expenses thereof.

But the grand objection against commencing a suit by special original is the *fine*, which in all such cases is payable to the king, the nature of which it may be useful to explain; and in so doing it may be proper to take notice as well of the *fin*es formerly payable by the suitors in the superior courts, as of those which continue to this day to be exacted from them by the crown.

Of the fine payable thereon.

All *fin*es and *amerciaments* * (says *Bracton*) belong to the king, as *fin*es upon original writs, and *fin*es *pro* *licentia concordandi*: and the reason is, because courts of justice are supported at his charge; and whenever the law puts the king to any charge for the support and protection of his people, it provides him money for that purpose, which is called *vestigial judiciorum*. *Fin*es were originally of several sorts (*Beecher's case*, 8 Co.): some in nature of an exaction by the king, upon giving leave to a subject to prosecute a suit in his superior courts; others in nature of a penalty set on offenders after conviction, and on plaintiffs failing in their suits; on parties making false claims; or for fraud and deceit to the court; for vexation under colour of law; for contempt against the king's writs or statutes. Others again in nature of an imposition set by the court on the suitors, with a view to enforce plainness and perspicuity in pleadings. These latter were imposed even in the inferior courts, till the statute of *Marlbridge* (52 Hen. 3. c. 11.) provided "that neither in the circuit of justices, nor in counties, hundreds, and courts of baron, any fines shall be taken of any man *pro pulchre placitando*, or *beaupleading*." Which statute was further enforced, and made to extend to the superior courts also, by the statute *Westminster* the first (3 Edw. 1. c. 8.). But the former species of *fin*es have been suffered to continue. And they were formerly of money, or other

*Fin*es belong to the king.

Different sorts of *fin*es.

What *fin*es taken away.

What continue.

* The difference between a *fine* and *amercement* is this, an *amercement* is ordered by the court, but assessed by the jury; but a *fine* is not only ordered, but assessed by the court. And as for *amercements* which are ordered and assessed by the court upon officers who are in contempt or in default of their duty, these seem to be rather *fin*es than *amercements*, though they are commonly so called: and yet it hath been held, that where a pecuniary penalty is assessed by the court upon an officer, it is properly an *amercement*, but when on a stranger it is a *fine*.

things,

How formerly paid.	things, as money was exceedingly scarce. Sir Matthew Hale gives an instance of a <i>fine</i> paid at the commencement of a suit between the men of <i>Yarmouth</i> and <i>Hastings</i> , in the reign of king <i>John</i> , in these words, " <i>afferunt domino tres palfredos, & sex asterias narenfes</i> " " <i>ad inquisitionem habendam per legales, &c.</i> " which <i>fine</i> we see was of three state horses, and six herons or egrets.
Grew exorbitant.	So exorbitant were the <i>fin</i> es upon original writs, exacted from the subject in the reign of this king, whose misfortune it was not to know in what manner to use his prerogative, that they made one amongst the many complaints of the times, and seem to have occasioned the 44th article in the great charter; wherein the sovereign expressly stipulated in these words; " <i>nulli vendemus, nulli negabimus, nulli differemus justiciam vel rectum.</i> " But notwithstanding this concession, <i>fin</i> es did not cease to be required from the subject, upon obtaining leave to sue in the king's courts. For the sovereign's right to exact <i>fin</i> es in such cases was not at all in dispute, the barons only meaning to guard by the charter, that they should hereafter be imposed with moderation: having regard to the importance of the action, and ability of the party; as in criminal cases the court always considers, as well <i>qualitatem delinquentis</i> , as <i>quantitatem delicti</i> , as directed by the statute of <i>Westminster</i> the first, ch. 6. In consequence therefore of this provision in <i>magna charta</i> , the payment of <i>fin</i> es was put on a regular footing, and as they were reduced to a certainty instead of being <i>ad libitum</i> of the sovereign or his chancellor, and not so excessive as before, they were agreed to without any great hesitation.
Remedy applied.	
Fines became afterwards fixed.	
Of the time of paying it.	With regard to the time of paying the <i>fine</i> , and of whom it should be exacted in civil actions, there was a distinction. For if a plaintiff sued for a <i>debt</i> , and took out the <i>præcipe quod reddat</i> , he paid the <i>fine</i> immediately to the <i>curfitor</i> in proportion to his demand. And here the <i>fine</i> could be taken at first, the plaintiff having ascertained his demand, for which the <i>curfitor</i> could easily apportion the sum due for the <i>fine</i> ; which sum is mentioned, ch. 5. sec. 1. But if he took out a <i>pone</i> , or <i>si te fecerit securum</i> , with a view only to recover a satisfaction in general, the <i>fine</i> could not be taken at the first; because the intervention of a jury was necessary to ascertain the plaintiff's demand. And as this
When on commencement of suit.	was

was the proper writ for *trespass*, and consequential injuries arising from the neglect or deceit of the defendant, *he* was to pay it, and the amount of it was to be regulated by the damages given in the judgment; and an award of the writ of *capiatur pro fine* in such cases was entered up after the judgment, in this manner, “*Et predictus defendens capiatur.*” A similar entry was also made, and a like writ issued, in all cases after a judgment in the *King’s Bench* in a suit there by *bill*, which was the process of that court for *trespasses*, and such like injuries committed *contra pacem*, for which a *fine* was always payable.

When after judgment.

Of the *capiatur pro fine*.

From the nature of these *fin*es, and manner of taking them, arose the *joinder in action*, as it is termed in our law books. For all matters of debt, which the plaintiff had against the defendant, could be put in one and the same writ, because the *fine* could be taken at once by the *curfitor* upon making out the writ. But the plaintiff could not sue for a debt, or specific demand, and a *trespass* or other consequential injury, by one and the same writ; because the *fine* for the *debt* was payable at first by himself, and for the *trespass*, after the suit was determined, by the defendant: the amount whereof could not be known till it was imposed by the court, and the court could not impose it till a jury had ascertained what damage, injury, or vexation the plaintiff had sustained. Besides, the judgments in *debt* and in *trespass* were different; for after a recovery in an action of debt, there was also a judgment *quod sit in misericordia*, for the *amercement* *, which was to be affected in the county; whereas in *trespass*, after the recovery of damages, there was a judgment *quod capiatur* for the *fine* to the crown. Nor could *trespass* and *trespass on the case* be joined in one and the same writ; because, as the first favoured of a *criminal* nature, there was a *quod capiatur*; and as the last was only a *civil* injury, a *quod sit in misericordia* was entered.

Fines gave rise to the joinder in action.

As if they occasioned different judgments.

* As to *fin*es and *amercements*, and when and by whom *amercements* shall be affected, vide *Grieffy’s case*, 8 Co.—and *Beecher’s case*, *ibid*.

If the defendant was a duke, marquis, earl, viscount, or baron, the *amercement* was to 100 *shillings*, which was the greatest *amercement*; but if he was a gentleman or common person, it seems that it was affected in proportion to the nature of the demand against him, and his apparent ability to pay it. Vide 6 Co. 45, and authorities there cited in the margin.

When

How payment
of fine avoided.

When it became the practice for plaintiffs in personal actions immediately to sue out the writ of *capias quare clausum fregit*, in order to arrest the defendant, and thereby sooner compel an appearance [for which see Appendix D.], they avoided in great measure the paying of the *fine* to the crown. For upon a *capias* no *fine* was exacted; because the writ was supposed to issue for a *trespass*, though the court winked at a plaintiff's declaring in *debt*, *covenant*, or the like action, when the defendant was brought into court. And when the statute of 13 Car. 2. was made, requiring the true cause of action to be expressed in the writ to hold the defendant to bail in above *forty pounds* upon the arrest, the plaintiff had still an opportunity of avoiding the *fine* upon suing for a *debt* (unless he intended to proceed to *outlaw* the defendant), because he could shew his true cause of action by inserting an *ac etiam* clause in a *capias*. And though in fact a *debt*, or other matter of contract, was his only cause of action, yet it was considered but as a collateral charge, for the defendant was in fiction of law arrested for a *trespass*; and the *ac etiam* clause was for nothing more than to shew the true cause of action, and point out to the sheriff to what amount he might insist upon bail. The *fine* therefore was only paid by the plaintiff when he actually sued out a *præcipe quod reddat* for a *debt*, or a *præcipe* for a sum certain upon *covenant* broken, or *pone* for a sum certain on promise, which was never done, nor is it often done at this day, unless it is apprehended the defendant will be litigious, or is difficult of access, and has property which the plaintiff can reach by proceeding with a view to *outlaw* him.

In case however a writ of *error* should be brought upon a judgment by default in an action of debt prosecuted by a common *capias quare clausum fregit*, or a *capias* with an *ac etiam* in it, the plaintiff, if he would protect his judgment, and prevent the want of an original writ from being assigned for *error*, must sue out a real original writ in *debt*, adapted to the action he prosecuted; on which the *curfitor* will then apportion and take the *fine* from him, otherwise the judgment must be reversed; because it would appear to be in *debt*, when the process was for a *trespass*. But in case no writ of *error* should be brought on such judgment by default

default, then the plaintiff need not purchase any such *original writ*, and consequently the *fine* will be avoided. Nor need he purchase it after verdict, as then the error is cured. 18 *Eliz.* c. 14.

The actual *amerciamment* of the defendant after a judgment against him in *debt*, *covenant*, *case*, and the like actions, has long since been discontinued, though the form of awarding the writ continues in the entry of the judgment to this day. And the *capiatur* fine in actions of *trespass*, *ejectment*, and other actions favouring of a criminal nature, as it was oppressive to poor defendants who might have been *outlawed* for not paying it, or, if ever recovered, being seldom accounted for in the *Exchequer*, was taken away by the statute 5 *W. & M.* c. 12. and instead thereof the plaintiff is directed to pay the sum of 6*s.* 8*d.* to the *master* or *prothonotary* at the time of signing the judgment, which is afterwards allowed the plaintiff again when he comes before them to have the costs of his suit taxed against the defendant. So that the writ of *capias pro fine* has fallen into disuse.

Before the statute 5 *W. & M.* when the *fine* was pardoned, the judgment in the *King's Bench* was entered *nihil de fine quia pardonatur*. And since that statute, judgment is entered up in that court without taking any notice of the *fine*. But in the *Common Pleas* after the statute, they entered up judgment upon the statute, thus, *nihil de fine quia remittitur per statutum* *.

* Vide *Salk.* 54.

APPENDIX (C).

Of the original Process of the Court of Common Pleas, and the Alteration therein; and of the Pledges to prosecute.

Origin of jurisdiction of C. B.

All proceedings by original writ;

where got, and how returnable.

Intended as a superior court to the county court.

Practice of that court adopted.

THE court of *Common Pleas* possessed no original jurisdiction. The justices were merely substitutes of the crown, acting under a delegated authority, and having cognizance of such matters only as were particularly submitted to them. All proceedings therefore were brought into the court of *Common Pleas* by virtue of the king's original writ, which was purchased by the party suing, and obtained from the high court of *Chancery*, the grand repository of all original writs. They were made out by the proper officer, called the *curfitor*, (from the words *de cursu*, such writs being grantable of course,) and were adapted to the nature and exigency of the case. They were made returnable in the court of *Common Pleas*, and thereby gave the court jurisdiction over the cause. All subsequent writs, called *judicial writs*, issued from that court. This was the way that causes, of above 40s. value were commenced in the county courts before the establishment of the *Common Pleas*, viz. by original writ out of *Chancery*; for the county court had no original jurisdiction in matters exceeding 40s.: and as the *Common Pleas* was intended to be a higher court in civil cases than the county court, it in a great measure was governed by the same practice, and adopted the same process. It was for this reason that *pledges* to prosecute used to be returned on the original, in pursuance of the practice of the county court, which originated in the old law of *Frankpledge* as established by king *Alfred*, and which still prevailed in all the kingdom.

When

When an original was applied for, a short note called a *præcipe* was given to the *curfitor*, describing the names and additions of the parties, and the nature of the writ required. Four defendants, and no more were to be inserted in one writ. Of the præcipe for original.

Original writs were mandatory letters from the king, sealed with the seal in the chancellor's custody, and directed to the sheriff. They were in their nature two-fold, *optional* and *peremptory*; and were called by the names of a *præcipe quod reddat*, and a *fi te fecerit securum*, or for shortness a *pone*. Nature of original.
Their kinds;
præcipe,
pone.

The *præcipe quod reddat* was the proper writ when the plaintiff's action was for a specific thing; as for the recovery of a debt certain, or for the restoration of such a chattel, or for giving up such a house, or so much land, specifying the nature and quantity of it. By this writ the sheriff was commanded to summon the tenant or defendant to appear at *Westminster*, at such a day in term. But before the defendant was made acquainted with this writ, the sheriff was to take *pledges* from the plaintiff to prosecute his suit with effect, if he had not already found them in *Chancery* upon suing out the writ. These *pledges* were in those days real and responsible people, and not merely nominal, as of late; and the taking of them was usually entrusted to the sheriff, as he best knew those in his bailiwick, and was to collect the *amerciamment* set on them, if the plaintiff did not prevail in his suit; and if they could not answer the *amerciamment*, the sheriff was liable to the king for their insufficiency. At the day specified in the writ, or within a day or two after, the sheriff returned to the court of *Common Pleas* what had been done in pursuance of it; and if the defendant disobeyed the sheriff's verbal monition, he returned as well the names of the *pledges* found him by the plaintiff, as the names of those by whom the defendant had been warned or summoned to appear. Use of præcipe.

The *fi te fecerit securum* was the proper writ when the plaintiff only sought a recompence in damages from the defendant for some injury done by him. This writ authorized the sheriff, if the plaintiff made him secure to prosecute his claim, to put the defendant by *safe* Use of pone.

gages and pledges to appear at *Westminster* at the return, to answer the plaintiff's charge contained in the writ. In this case, if the defendant could not find *pledges* of sufficient responsibility for his due appearance in court, the sheriff was authorized to take *gages*, that is, some of his goods and chattels into his custody, the better to compel his attendance. Whatever he did therefore in consequence of this writ, he returned to the *Common Pleas*. But so tender was the law in those days of the liberty of the subject, that upon neither of the above writs could the *person* of the defendant be molested; nor indeed in any action, unless for some tortious act committed *with force*, and consequently in breach of that peace which his allegiance and duty required him to keep and preserve.

No taking of
defendant's per-
son.

Process by sum-
mons and dis-
tress.

The process therefore to compel an appearance to these writs was by summons and distress infinite.

If the defendant was to be found, the sheriff summoned him to appear in the *Common Pleas* according to the exigency of the writ, either by personal service of the summons, or by leaving it at his house or place of abode, and then returned the writ accordingly *summoneri feci*.

If the defendant was not to be found in the county, or had no house or land whereon he could be *summoned* or warned to appear (for in real actions a warning on the land by erecting a white stick or wand was sufficient), the sheriff returned the writ indorsed with a *nihil*, or "*nil habet in balliva mea per quod summoneri potest*," that the plaintiff might sue out process elsewhere against him.

When the *original writ* was returned to the court of *Common Pleas*, the court thereby became possessed of the cause, and all further process relating thereto issued from thence. If the defendant had been *summoned*, and did not appear there within *four days*, the *quarto die post* of the return of the writ, or send an *essoins* or sufficient excuse to the court why he could not attend, the plaintiff was at liberty to take out a further process against him. Of the *essoins* we have already had occasion to speak in the introductory observations in vol. i. B;

Fine allowed
on summons.

at

at present let it suffice to say, that these intermediate days were allowed *ex gratia* by the court, and partly arose from an idea entertained by our ancestors, that it was beneath the dignity of a *free* man to appear or do any other act at the precise time for that purpose appointed, and partly from a consideration of the court, that some unavoidable accident or other might happen to occasion a delay, though the party did not mean to send an excuse, and had no intention to disobey the king's writ.

The next process which issued from the court of *Common Pleas*, upon a disobedience to the original writ, was called an *attachment*, and though it could not actually be sued out till the *quarto die post* of the return of the original, might yet bear *teste* on the very return-day of that writ. The writ of *attachment* commanded the sheriff to put by safe *gages* and *pledges* the defendant, so that he appear at *Westminster* on such a day in term. These *gages* were again forfeited, and his sureties also amerced in case of his non-appearance within the *quarto die post* of the return of this writ of *attachment*, unless he had sent an *essoyn* in time to excuse his default. For the meaning of the *quarto die post*, see introductory observations, vol. i. B. 4.

Of the attachment thereon.

The subsequent process to the *attachment* to compel an appearance was a writ of *distingas*, which bore *teste* on the very return-day of the writ of *attachment*, though not actually sued out till the *quarto die post* inclusive of such return; and if the defendant again made default, a like writ might issue *ad infinitum*, commanding the sheriff to *distrain* the defendant from time to time; which was done by taking his goods, and the profits of his lands, called *issues*, which were all forfeited to the king if he did not appear. And here by the *common law* the process determined with the most contumacious defendants in all civil injuries that were not accompanied *with force*; the defendant being gradually stripped of his substance, if he had any, by repeated distresses, till he rendered obedience to the writ: and if he had no substance, the law then considered him as incapable of making satisfaction, and therefore looked upon all further process as nugatory.

Of the distress.

Process against
the person in
trespass.

By *capias*.

How made out.

Nature thereof.

How signed,
and tested.

Introduced into
other actions.

Process by sum-
mons disused.

Still at plain-
tiff's election;
and in some
cases revived.

Thus then the only process in ancient times to compel an appearance was by summons, and distress infinite, except in actions of trespass *vi & armis*, and those favouring of a breach of the peace, as deceit, conspiracy, and the like, which as they were looked upon of a more heinous nature, the law allowed a more compulsory process, and suffered the sheriff to serve the person of the defendant, and imprison him till the return-day, when he might bring him into court. This was done by a writ or process called a *capias ad respondendum*. But this did not issue in the first instance, there was still an original writ, and the *capias* was only the process on such writ instead of the summons and distress. It was therefore made out conformable to the original writ before sued out, and returned and bore *teste* on the return day of that writ: the *capias* being only a process of the court grounded on the contempt upon disobedience to the original. It issued therefore under the private seal of the court of *Common Pleas*, and not under the great seal of *England*, and was tested not in the king's name but in that of the chief justice only; and was denominated a *judicial writ*, as all other writs were, subsequent to the return of the *original*. But this process of the *capias* was gradually introduced, and allowed in other actions beside those of trespass *vi & armis*, and the like, as will be shewn in the next Note; and as it was found a more summary and effectual mode of compelling an appearance than the process by distress, and more especially as an alteration afterwards took place in the practice of the court of *Common Pleas*, by permitting the *capias* to issue in the first instance without any original writ actually sued out (which will be also shewn in the next Note), the process by *capias* became generally adopted, and the old process fell into disuse; still however it is at the option of the suitor, either to proceed by original *quare clausum fregit*, summons and distress, or by *capias*; and as the former mode is at this day frequently adopted where the defendant has goods, but cannot be met with, from the convenience of *personal service* not being required upon the summons, which it is of the *capias*, I have endeavoured to explain the origin and meaning of this method of proceeding, and to shew, that however novel it may appear to the practitioner, it is in fact the ancient process revived, and known to our law in many actions long before the pro-

cess

cess by *capias*. The mode of proceeding by original *quare clausum fregit* and summons is shewn, chap. 5. sec. 2.

Of the Pledges for prosecuting.

As it has been observed, that in former times the sheriff was to take real *pledges* from the plaintiff for the prosecuting of his suit; and, as even in these times the form is adhered to of putting *pledges* to prosecute to the original writs in *C. B.* and to the bill or declaration in *K. B.* it may be useful to the student to add a few words upon the origin of this practice, and how it has substantially fallen into disuse, the shadow of it only, and indeed barely that, being now preserved.

The finding of *pledges* was an institution of the great *Alfred's*, who classed the whole people in *decennaries*, consisting of ten families each, and those numbered in each *decennary* he made the mutual and standing *pledges* for each other's due obedience to the laws, and preservation of the public peace. No one by his establishment could prosecute any civil action whatever, unless he could find two or more of the same *decennary* as *pledges*, to satisfy the court that he had a real cause of complaint, and was not of a litigious and quarrelsome temper. And as the defendant was to be put to some trouble and expence in contesting the suit, these *pledges* were always required of the plaintiff immediately upon his complaint to the court. The smaller arrangement of the people in *decennaries* soon falling into disuse, from the difficulty there was of enrolling every subject, and classing those foreigners who casually resorted here to carry on trade, and had no fixed habitations in *England*, it was thought sufficient if the plaintiff upon commencing a suit, and the defendant upon being cited to appear to it, found *pledges* of the same hundred or county with himself. The finding of *pledges* was so reasonable an institution, and so well calculated to prevent both vexation and delay, that in the various revolutions of the government, from *Alfred's* time till long after the reign of *Edward the First*, it was never once discontinued or abolished. Upon the division of the courts, however, in his time, when their several jurisdictions were ascer-

Introduction of
pledges.

Reason thereof.

Of the time
when they were
to be found.

Difference as to
the time in
K. B. & C. B.

tained and established, an alteration took place with regard to the time when the plaintiff's *pledges* for prosecution should be found, and by whom they should be taken. If the plaintiff sued by *original writ* returnable in the *Common Pleas*, his *pledges* were usually found in the country and taken by the sheriff, before even the defendant was summoned to appear to the action, and their names were returned by the sheriff upon the original. But in the *King's Bench*, when a plaintiff filed his bill of complaint against the defendant for a *trespass* (for otherwise that court had not cognizance of it), they did not always require him to find his *pledges*, before the process went forth to the sheriff to bring in the party; because, as that court was ambulatory, and followed the sovereign, the plaintiff might not have his *pledges* at hand, or be known to any one in the county where the court at that time happened to be sitting. Besides, it was imagined, that one who had committed a *forcible injury* in breach of the peace was likely to avoid being taken, as the commission of such an injury made him not only liable to pay a *fine* to the king, as well as damages to the plaintiff, but also subjected him to an imprisonment before trial or conviction. The court of *King's Bench*, therefore, did not as formerly insist upon having the *pledges*, before process was awarded to bring the defendant into court; because if they had waited till the plaintiff could have produced them, it would not only have occasioned a causeless delay to the inquiries of justice, but have given an opportunity for the defendant to effect an escape, and avoid the most diligent search of the sheriff.

Which is the
reason why they
are put to the
declaration in
K. B. and not
in C. B.

But when the defendant was apprehended or brought into court by the *bill*, or its subsequent process, the plaintiff was called upon for his *pledges*; and if they were not produced when he came to declare, the defendant might have demurred or pleaded in abatement, for he had no occasion to make any defence till they were found. So that, when pleadings *ore tenus* in court were refused, and came to be entered in writing by the clerk, and copies thereof made out for the parties, the names of the *pledges* for the prosecution were always entered in this court at the end of the declaration, that being the stage of the suit in which they were obliged to be found on the process by *bill*; the form

form of which entry, though the finding of real and responsible *pledges* has long since ceased, continues to be used to this day. But in the *Common Pleas*, the names of the *pledges* were not inserted at the end of the declaration, because they were required immediately upon the *original*, and had been inserted therein, and therefore had no need to be mentioned again when the plaintiff came to count on his writ.

If the plaintiff failed in his suit, his *pledges* were amerced by the court, and the entry thereof in the judgment was, "*Ideo consideratum est quod predicti. querent. & pleg. sui de proseguend. sint inde in misericordia, &c.*" but without taxing them at any sum certain. After which the *amercement* was estreated, then delivered to the clerk of the assize in the circuit, who afterwards delivered the same to the coroner of the county, who assessed*, that is, assessed the *amercement* according to the nature and proportion of the vexation, and the ability of the party. And that assessment by the coroner was held a satisfaction of the statute of *magna charta*, which provided that "*nulla predictarum misericordiarum ponatur, nisi per sacramenta proborum & legalium hominum de vicineto. Comites autem & barones, non amercientur, nisi per pares suos & non nisi secundum modum delicti.*"

Of the amercement of the pledges.

Estreating thereof.

Sheriffs in time growing remiss in their duty, allowed of any persons as *pledges*, sometimes returning the names of fictitious persons as *pledges*, at others, neglecting to require or return any at all. And though the want thereof might have been taken advantage of by demurrer, plea in abatement, or assigned for error; yet the courts, in their liberality, sooner than the plaintiff should be delayed, or that their judgment should be liable to be reversed for so frivolous an objection, which did not affect the right of the suit, would suffer the plaintiff to find them at any time pending the suit, and enter their names as if really found at the proper time to the sheriff or court. And the legislature, to supply the want of real persons as *pledges*, and recompense the defendant where he has been unjustly or vexatiously sued, has, by various statutes, either given

How fictitious pledges introduced.

Allowance of costs to defendant taken away use of pledges.

* *Vide* 2 Co. *Griefley's case*, and 1 Lord *Raym.* 330.

him

Even the form
has now in a
great measure
vanished.

him the costs he has incurred in making his defence, or else deprived the plaintiff of recovering those costs he is entitled to by law, in cases of obtaining a verdict, by leaving it to the judge at the trial to certify on the record, that he had little or no cause of action. Since these statutes for allowing the defendant his costs, where the plaintiff fails, or is nonsuited, the writ to the coroner to assess the *pledges* has fallen into disuse, and two ideal persons, *John Doe* and *Richard Roe*, have become the ready and common *pledges* of every suitor. The want however of their names upon the *bill* or *original*, was not aided till the statute 16 & 17 *Car. 2. c. 8.* though a verdict had been had for the plaintiff. But for the better removal of this ground of objection, it was further enacted by the 4 & 5 *Ann. c. 16.* "that no exception shall be taken for default of *pledges* on the declaration or bill, unless it be shewn *"for cause of demurrer."* And since this last statute, on a *special demurrer* for want of *pledges* on a declaration by *bill*, the court, notwithstanding, gave judgment for the plaintiff; holding, that he might enter them any time before judgment, because *pledges* are not liable until judgment, and not even then if it be given for the plaintiff. Nor can the want of *pledges* now be taken advantage of in *error*, though judgment pass by default; for since the above statute of *Queen Anne*, the want thereof is but matter of *form*.

APPENDIX (D).

Of the Arrest in Civil Actions.

At common law
no arrest except
in trespass.

Principle there-
of.

IN the early ages of our constitution, so great a regard was paid to the liberty of the subject, that no arrest or detention of the person was allowed in any civil case whatsoever, except in an action of trespass *vi & armis*. The principle by which our ancestors in this respect were governed was, that as all debts or breaches of contract could only be an injury or loss to the personal estate

estate of another ; so nothing but the goods or personal estate of the debtor or offender should be liable to make satisfaction. The *mesne* process therefore to bring defendants into court to answer to the charge, was by *distress* on their chattels ; and when judgment was obtained, their chattels only could be taken in *execution*. But if any actual assault or trespass was committed upon the person or property of another, and thereby a breach of the public peace was occasioned, which it was the bounden duty of all to preserve, such an offence was deemed a forfeiture of that personal protection to which the offender would otherwise have been entitled ; and upon a charge of this kind, being rather of a criminal than a civil nature, his body was liable to be arrested in the first instance, and after judgment to be detained in execution.

What was the
mesne process.

The same practice continued for some time after the introduction of the feudal system by William the Conqueror ; but perhaps an additional reason may be given why it should prevail under that form of government. The very essence of that system was, that both the *lands* and *person* of the tenant were answerable for the duties to his lord. No alienation of the former was permitted without the lord's consent ; and the latter was obliged, if called upon, to attend the king in his wars ; or when at home, to serve his lord according to the nature of his tenure. Neither the one nor the other therefore could be subjected to the payment of debts, the laws being at that time calculated and framed for a nation bred to warlike achievements.

Same practice
at the time of
feudal system,
why.

But in progress of time, real property gradually became unfettered, alienations were in some measure allowed by the great charter without acquainting the lord, population increased, trade began to flourish, commerce was introduced, merchants grew respectable in character, and of consequence in the state ; dealings between men became extensive and complicated ; the wide field of credit, the very life of commerce, opened itself ; the completion of things were altered, towns rose from their insignificance into importance ; and wealth, the natural fruit of industry, which poured in upon the cultivation of arts, manufactures, and science,

Causes of al-
teration therein.

soon

soon elevated the middling class of people; whilst poverty, the sure attendant of prodigality, depressed, and at length proved fatal to the haughtiness and superiority of the powerful barons.

So great a revolution in the manners of a people necessarily occasioned a change in the government and laws of the country.

Arrest in civil cases necessary to protect trade and credit.

The extension of trade and commerce was soon found so important to the well-being of the state, that it was deemed expedient to give every encouragement and protection to the industrious trader, and to enforce, as much as possible, honesty and punctuality in the payment of debts and the observance of contracts. To effect this, it was found necessary to extend the law of arrests to civil cases, and to render *lands* liable to the discharge of debts, as otherwise the fraudulent debtor had the means of escaping justice by secreting personal property not his own, and living upon landed property in defiance of the very creditor to whom he was indebted for the identical money with which he purchased it; at the same time, as will appear from the following acts of parliament, the legislature proceeded step by step, cautious of making any unnecessary sacrifice of the personal freedom of the subject.

Different statutes authorizing the arrest.

Statute of Marlbridge,
2 Hen. 3.

Allowing arrests of bailiffs in certain cases.

The first statute of the kind was in the fifty-second year of the reign of Hen. 3. called the statute of Marlbridge, and was in aid of the barons, who had frequently experienced the fraud of their bailiffs in absconding with their rents, and leaving no property behind them to make satisfaction. It enacts, "That if bailiffs, which ought to make account to their lords, *do withdraw themselves and have no lands nor tenements* whereby they may be distrained, then they shall be attached by their bodies; so that the sheriffs in whose bailiwick they be found, shall cause them to come to make their accounts." But any freehold estate in his own right, though not sufficient to satisfy the demand, took the case out of the statute; so also, if he did not withdraw himself; and if the bailiff was arrested wrongfully, he might have his remedy against the lord by action. 2 Inst. 144.

The

The next statute was in protection of the merchants, made in the 11th year of the reign of Edw. 1. and called the statute of Aſton Burnel, the parliament at that time being held there. It recites, that "foras-
 "much as merchants, which heretofore have lent their
 "goods to divers persons, be fallen in poverty, because
 "there is no speedy remedy provided whereby they
 "may shortly recover their debt at the day of payment;
 "and for this cause, many merchants do refrain to come
 "into the realm with their merchandize, to the damage
 "of such merchants and of the realm;" and it then
 gives a power to the merchant of bringing his debtor
 before a magistrate, and getting his debt acknowledged,
 and after the day of payment suing out process against
 his property; and if that was not sufficient, to *take his*
body. But as this statute was not much enforced, in the
 13th year of that king, another statute was passed of a
 much more rigorous nature, reciting the former, and
 giving further powers of selling the *land* of the debtor
 by a reasonable *extent*, and to imprison him till satis-
 faction made.

Statute of
 merchants
 11 Edw. 1.
 13 Edw. 1.
 Arrests allowed
 in favour of
 merchants;

and lands al-
 lowed to be
 sold.

The two last-mentioned statutes form one law called
 the statute of merchants.

This privilege having been given to the merchants, the barons claimed still further power on their part, and in the same 13th year of Edw. 1. (c. 11.) another act passed in favour of them, ordaining "that when masters
 "have assigned auditors to take their *accounts*, and their
 "servants, bailiffs, chamberlains, and receivers are found
 "in arrear, their bodies shall be arrested, and by the
 "testimony of the auditors, shall be sent or delivered
 "to the next gaol, to be kept by the sheriff in irons, at
 "his own costs, till he satisfies the arrears." The sta-
 tute further gives the consequential process of exigent
 and outlawry thereon. *Vide* the statute. This was a
 severe law, in comparison to that of Henry 3. first
 passed against bailiffs.

13 Edw. 1. c. 11.
 arrest in actions
 of account,
 and process of
 outlawry al-
 lowed thereon.

Thus stood the law of arrests, till the 25th year of the reign of Edw. 3. (c. 17.) when it was enacted, that
 such process shall be made in a writ of *debt* and *detinue*
 of chattels, and *taking of beasts*, by writ of *capias*, &c.
 as is used in a writ of account.

25 Edw. 3.
 c. 17.

Arrest extended
 to debt and de-
 tinue.

27 Edw. 3.
Conusor of statute staple.

19 Hen. 7. c. 9.
Arrest given in actions on the case;

23 Hen. 8.
c. 14.
in forcible entry, annuity, and covenant.
21 Jac. 1. c. 4.
In penal actions.

The stat. of Edw. 1. therefore was then extended to actions of debt, and detinue. The stat. of 27 Edw. 3. stat. c. 2. 9. enables the mayor of the staple to arrest the conusor of a statute staple. For a long period of time, namely, a century and an half, no further extension of the law of arrests took place, until at length, in the 19th year of the reign of Hen. 7. (c. 9.) The same process is given in *actions upon the case* as in trespass or debt. And in the 23d year of Hen. 8. (c. 14.) the like process is ordained in actions for forcible entry on 5 Rich. 2. and also in actions of *annuity* and *covenant*. And, lastly, by the 21 Jac. 1. c. 4. it is extended to popular actions, and the same process given in them as in trespass *vi & armis* at common law.

Thus, by the interference of the legislature from time to time, is the process of the *capias*, and its concomitants the exigent and outlawry, now given in all civil cases: in the action of trespass, replevin, ejectment, deceit, conspiracy and fraud, by common law; and in *account*, debt, detinue, case, annuity, and covenant, by the above statutes.

How the arrest was encouraged by the courts by indirect means.

By declaring by the bye.

In all the courts.

One circumstance, perhaps, which expedited this extension of the *capias*, might be, that the legislature saw the courts were effecting, by indirect means, the imprisonment of the defendant, though not directly authorized so to do. And this was accomplished by the practice of declaring, as it is now termed, by the *bye*; that is, of charging the defendant, after he was once in court for one cause of action, with another fresh cause. Now, as at common law, the charge must have been a *trespass* to have authorized an arrest, process was sued out upon a charge of *trespass*, on which the party was taken into custody, and then this fictitious charge was suspended or abandoned, and a declaration delivered by *the bye*, charging him with a common debt or breach of promise; for it was held by the practice of the court that when once the party was in the custody of the court, he was to be detained there till he had answered every charge which might be brought against him, pending the investigation of the original charge. Such was the mode adopted both in the King's Bench and Common Pleas, and the court of Exchequer also availed themselves of the same kind of fiction, by charging

charging a person with being a *supposed* debtor of the king, getting him into their custody, and declaring in any common civil action.

But although the *capias* was by degrees extended to civil actions as above shewn, still it only issued in consequence of the party's disobedience to the process of the court; for it was necessary in both courts that the original bill or writ should be first filed or regularly issued, that the plaintiff should find real pledges to prosecute, lest his action should be malicious, and that a summons or warning to appear should be first given to the party by the sheriff on the writ of *pone* or attachment, and it was not till a disobedience thereto, that the *capias* was to issue.

Capias at first only issued after defendant had disobeyed the *pone* or attachment.

But even these preliminaries were by degrees omitted as unnecessary, the pledges to prosecute, as we have before seen [*Appendix C*], became mere matter of form, and at length, for the sake of expediting the proceedings, and preventing the defendant from eluding the process of the court, it became the practice to sue out the bill of Middlesex and *capias* in the first instance, without any original bill actually filed, or original writ sued out, or any summons or warning given to the defendant. This practice prevailed in a great degree before the time of Charles the Second; but by the statute of the 13th of that king, whereby the real cause of action was obliged to be inserted in the process, it came into general use. For upon that the court of King's Bench, to preserve its jurisdiction over civil causes where the party was to be arrested for above 40 *l.* was obliged to resort to the expedient of inserting the *ac etiam* in their bill of Middlesex [as before shewn, *Appendix B*]. On which account Sir John Keelynge, then Ch. Jus. of the King's Bench had a long contest with Sir John Vaughan, then Ch. Jus. of the Common Pleas, who succeeded the latter judge, being unwilling to renew the dispute, suffered the court of King's Bench to continue quietly in the exercise of that practice, and made an order for the allowance of a similar clause of *ac etiam* in the writ of *capias quare clausum fregit*. the common process of that court, and that it should be so used in all bailable actions. The consequence of which was, that the

Capias afterwards issued in first instance.

Of the 13 Car. 2

Introduction of *ac etiam*

in both courts.

Operation thereof.

the *ac etiam* became a substitute for the original writ; nor did any original writ issue; which is the practice at this day in all personal actions where the plaintiff does not intend to proceed to outlawry, in which case the original writ must be sued out. So that the arrest was authorized by the bill of Middlesex, or *capias*, which supposed that the defendant had committed a trespass, or broken the plaintiff's close *vi et armis*; and the engraving of the clause of the *ac etiam* was only to shew the true cause of action, and to point out to the sheriff to what amount above 40*l.* he might insist upon bail.

No use for original bill or writ, except on error after judgment by default.

Such is the brief history of the law of arrests, and of the seizure of a man's person, in the first instance, upon a bill of Middlesex, *latitat*, or *capias*, without any previous writ. The delay of suing out the original is thus avoided, and the expence of the fine payable thereon to the king saved (for which see *Appendix B.*), whilst the whole proceedings are grounded upon the mere supposition that an original bill or writ, have been previously filed, without which the court could have no jurisdiction in the action. The want therefore of such an original would have been fatal on a writ of error, but now it is cured by statute of Elizabeth *after verdict*, and is only cause of error after judgment by default; and even in this case, if error be brought upon application to the master of the rolls, an original may be made out *nunc pro tunc*, which will operate by relation so as to warrant the proceedings; and this, even in *penal* actions. [See *Appendix B.*]

Thus have we endeavoured to shew the rise and progress of that power which the creditor exercised, and still may exercise over the person of his debtor; it remains now to explain in what way the severity of the law has been in some degree mitigated in favour of the latter, by his discharge on bail, and the difference between common and special bail.

APPENDIX (E).

Of Bail in Civil Actions; of the Difference between Common and Special Bail; and why in K. B. it is called filing Common Bail, and in C. B. entering an Appearance. [For the Forms of Writs, see Appendix F.]

THE arrest of the defendant, as appears from the preceding note, was warranted in all actions where-
in the process of *capias* was allowed, and in all cases
whatsoever of trespass *vi et armis*. The amount of the
debt or demand, or the extent of the injury, was of no
consequence, the sheriff was ordered by virtue of the
process to seize the defendant, and to detain him in
custody till the return of the writ. No bail was al-
lowed, at least it was at the peril and risk of the sheriff
to take bail. The liberty of the subject, so strenuously
protected by the arm of the common law, seemed now
exposed to the most imminent danger. The security
which a defendant derived from the pledges to prose-
cute, formerly given by the plaintiff at the commence-
ment of his suit, and who were answerable if he
did not shew some foundation for his claim, no
longer existed. No specific charge was alleged in the
process; no debt sworn to; any one was liable to be
suddenly seized by the iron hand of power, and dragged
from his home to a dungeon, a victim to malice or
revenge; a serious sufferer for the smallest and most
trivial debt or offence. When arrested, he was sub-
ject to the insults, oppression, and extortion of the
sheriff or his bailiffs; who, availing themselves of the
undue advantages of their situation, actually let out to
farm the emoluments of their offices. The courts in-
deed exercised a discretionary power, and in very trifling
actions suffered the parties when brought into court to
go at large, which was the origin of common bail, as
will be presently shewn; but then it must have appeared
upon the face of the process that the demand was for
a trifling

Arrest in tref-
pafs and on pro-
cess of *capias*,

without any
respect to the
amount of debt.

Hardships en-
dured.

Extortion of the
sheriffs.

Discretionary
power in court
to discharge on
common bail
but seldom exer-
cised.

No remedy till
the statute
23 Hen. 6. c. 9.

which was but
of little avail.

Extent of bail
in K. B.

In C. B.

Reason of dif-
ference in their
recognizances.

Courts did not
bail, if action
above 10 l.

Grievances still
existed,
appears from
preamble of
23 Hen. 6. and
8 Eliz. c. 2.;

a trifling sum, and there was no restraint upon the plaintiff to prevent his stating the cause of action to be to any amount. Such was the hardship which attended the law of arrests; nor was any remedy attempted to be applied till the 23d of the reign of Henry 6. when an act passed, enacting "That such offices (namely sheriffs and the like) should no longer be let to farm, and that persons arrested shall be discharged upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons be so let to bail, to keep their days in such place as the writ shall require." See an explanation of this stat. ch. 4. sec. 4. But this act was but of little avail, for still malice might be gratified, by prosecuting for a sum far beyond the ability of the defendant to get bail for: more especially in the King's Bench, as, by the practice of that court, whoever became bail was answerable not merely for his forthcoming to answer that charge for which he was arrested, but to answer all other persons that should come in against him, and sue him by *bill* pending the first suit; and moreover, as the charge was for a trespass, and the damages to be recovered uncertain, the bail were not bound in any certain sum, but engaged that the defendant should pay to the plaintiff whatever he recovered, or render himself to the marshal, or that they would satisfy the damages. But in the Common Pleas the practice was otherwise, for there a certain debt or damage was expressed in the writ, and the bail only stipulated for him in the action, and in a sum certain. It is for this reason, and from this ancient practice, that the recognizances in the two courts at this day differ; in the Common Pleas being taken in a sum certain, in the King's Bench not. Nor did the courts exercise their discretionary power so as to grant effectual relief; for their practice was, not to discharge the defendant on common bail in any case where the plaintiff stated his cause of action to amount to 10 l. or upwards, though a little before they limited it to 20 l.

The engine of oppression, which the law of arrests at that time was, in the hands of the wicked and powerful, manifestly appears, not only from the preamble of the above statute of 23 Hen. 6. which reprobates the extortion and injustice complained of, but also from that of the statute of 8 Eliz. c. 2. whereby the legislature

gave

gave costs and damages to the defendant as a check to the abuse which prevailed of bringing malicious actions, and after the imprisonment of the party, not even declaring in them, and for which, before this statute, there was no redress to the party injured. The same statute also provides against another evil which existed, of suing out process and arresting a party in the name of a third person without his leave, and often when no such person existed.

and the evils there noticed.

It surely appears surprising that no steps were taken to ease the subject of a load, the weight of which was so manifestly oppressive. But from the time of Henry the 6th, till the 13th of Charles the 2d, nothing appears to have been done: an act then passed which has before been noticed in *Appendix B.* and *D.* ordering the particular cause of action to be expressed in the writ, in all cases where the sheriff was required to take bail for 40*l.* or upwards, which was the origin of the *ac etiam* clause in the writs. But still nothing prevented the damages or debt being laid at any enormous sum the party chose; and the mere expressing the cause of action, as debt or the like, in the writ, so long as the amount of such debt was laid at the option of the plaintiff, could be but of little avail: besides which, even if the specific demand was accurately stated, it only applied to cases where bail was required for 40*l.* The poorer class of people therefore were still the objects of oppression; and though no specific cause of action were mentioned, yet they were compelled to find bail for 40*l.* or be thrown into prison. Nor was any relief bestowed till the late period of the 12th year of the reign of George the First; when an act passed (12 Geo. 1. c. 29.), by which it was enacted, "That no person shall be held to special bail upon any process where the cause of action shall not amount to 10*l.*; but in such case the plaintiff shall only serve him with process, and if he does not appear, plaintiff may file common bail, or enter an appearance for him. And in all cases where the debt or cause of action amounts to 10*l.* an affidavit must be made before a judge or proper commissioner, and the sum specified in such affidavit shall be indorsed on the back of such writ or process; for which sum so indorsed, the sheriff or officer shall take bail, and for no more. If

Act of 13 Car. 2d

Defect thereof.

Most effectual remedy given by 12 Geo. 1. c. 29.

No arrest under 10*l.*

Affidavit of debt required.

Sum sworn to, indorsed on writ.

"no such affidavit and indorsement, the defendant is
 "not to be arrested, let the amount of the debt be
 "what it may." The court strictly require the affidavit to be positive. See ch. 4. sec. 1.

Made perpetual,
 and extended to
 inferior courts.

The above statute was made perpetual by the 21 Geo. 2. c. 3.; and by 19 Geo. 3. c. 70. no arrest is allowed on process out of *inferior* courts if the cause of action be under 10 *l*.

Ac etiam only
 required as before.

It is observable, that nothing is said in the above statute of the *ac etiam* clause, or of specifying the true *cause of action* in the writ; so that the law in this respect stands as before, and no *ac etiam* need be inserted unless the defendant is to be held to bail for 40 *l*. as by the stat. 11 Car. 2. 1 H. Blac. 310.; though the common and indeed the best way is to insert it in all writs where defendant is to be held to bail.

Such were the slow but gradual steps by which justice seems to have advanced to the relief of defendants, who, at length, when arrested, became entitled to be discharged upon bail, and their adversary compelled to specify upon oath the nature of the charge and exact amount for which the sheriff was to take security.

How the ancient and modern practice of arrests differ.

Thus stands the law at this day; and the difference in this respect between the modern and ancient practice is most extraordinary. Originally no arrest was allowed for any debt, or purely civil cause of action, but only for trespasses committed *vi et armis*. Now the law is reversed, no arrest being allowed in actions of trespass *vi et armis*, (except by a particular order of a judge,) but, only in cases of debt and other civil actions.

But, in what cases special or common bail is now required, see ch. 2.

Different kinds of bail; to the sheriff, and to the action.
 Bail to the sheriff.

It is observable that there are two kinds of bail: bail to the sheriff, or bail below; and bail to the action, or bail above. The first is given to the sheriff immediately upon the arrest, according to the stat. Hen. 6. the sureties enter into a bail-bond, with a condition that the defendant shall appear in the court, and at the time specified in the writ. Formerly, if the condition of the bond

bond was broken, the plaintiff could only proceed against the sheriff, by ruling him to return the writ; but he had no remedy against the sureties on the bail-bond, unless the sheriff delivered it up to him, and gave him leave to sue in his name, which was purely optional. But as an additional remedy (by the 4 and 5 Ann. c. 16. s. 20.), the sheriff, at the request and cost of the plaintiff, must now assign to him such bail-bond, by a proper indorsement thereon, and plaintiff may bring an action against the sureties in his own name; so that now he has a double remedy, either against the sheriff, which he may still pursue, or against the bail, as assignee of the bail-bond.

Of the assignment of bail-bond.

When the defendant has appeared according to the condition of the bond, bail *above*, or to the action, are then put in, who enter into a recognizance to be answerable for the damages, which may be ultimately awarded if the defendant does not pay them, or render himself to prison: these recognizances differ in the two courts, as before observed.

Bail to the action.

For a full explanation of bail below and bail above, and proceedings therein, see ch. 4.

Before I leave this subject of bail, it may be useful to add a few words on the origin of common bail, and the difference between that and special bail. The latter, we find, is when real responsible sureties are actually given; the former is merely nominal bail, John Doe and Richard Roe, of no possible use, by way of pledges or security. Yet it seems that the distinction between common and special bail took place very early, for Sir Edward Coke cites an entry of bail in the twenty-seventh year of King Henry the Third, *coram rege*, in these words, "*H. P. captus per querimoniam mercatorum Flandriae, et imprisonatus offert domino regi Hus & Haut in plegio ad standum recto, & ad respondendum predictis mercatoribus, et omnibus aliis qui versus eum loqui voluerint,*" &c. "Of these words (says Sir Edward, 4 Inst. 72.), *hus* and *haut* (two French words), *hus* signifying an elder-tree, and *haut*, the staff of an halbert, &c. I leave the conjecture that some have made thereof to themselves: we think it was then common bail, now changed to *Do* and *Ro*; and the

Origin of common bail, and difference between that and special bail.

Common bail of great antiquity.

U u 3

"rather,

“ rather, for this word *offert* : and it is observable, that
 “ by putting in bail at one man’s suit, he was in *cust-*
 “ *todiâ mareschalli* to answer all others which would
 “ sue him by bill, and this continueth to this day.”

Reason thereof.

This conclusion of that eminent lawyer appears fairly drawn ; and the student may, from such an authority, with confidence infer, that the practice of putting in common bail is of ancient origin. We have before shewn, that the court exercised a discretionary power in holding defendants to special bail or not, according to the amount of the demand. At first, as appears by a rule of court in the Complete Attorney, printed in 1676, fol. 45, they limited it to 20*l.* afterwards to 10*l.* ; and although in causes under 10*l.* actual bail was not required, yet the defendant was brought up by the sheriff on the return of the writ, and in order that he might be in court, and supposed to be in their custody ready to receive any other charge that might be exhibited against him, common bail was filed of record in the names of John Doe and Richard Roe. And it is now necessary that this common bail should be filed in all actions notailable, before the plaintiff can proceed, for till then the defendant is not in court ; but by the last statute of 12 Geo. 1. c. 29. after the defendant has been served with process, the plaintiff, if he does not appear within the time allowed, may file common bail, or enter an appearance for him.

How in C. B.
 called entering
 an appearance.

Reason thereof.

In the Common Pleas the same distinction is made between common and special bail ; but it is there called *entering an appearance* ; and the form, instead of being as in the King’s Bench, *that A. B. having been served with process, is delivered to bail, (that is to say,) to John Doe and Richard Roe, at the suit of C. D.* it runs thus, *B.’s appearance for A. B. late of W. in the said county, yeoman, at the suit of A. B.* The reason of this seems to be, that in the King’s Bench, as their original jurisdiction was only in matters of trespass, and the bill was therefore sometimes called the bill in trespass, and as in all cases of trespass the party was liable to be arrested, the defendant was of course in every action brought into court, and delivered into the custody of the marshal.

There

There was no process to compel an *appearance*, as by distringas, or the like; but as the bill now called the bill of *Middlesex*, or the *latitat*, was only supposed to issue in cases of trespasss, the defendant's person was liable to be seized: when in court, he was supposed to be in custody of the marshal; it was upon this supposition that other actions, not of trespasss, were afterwards brought against him. And to preserve this jurisdiction, it was necessary that he should either be in the actual custody of the court, or let out by the court upon bail; which, when civil actions becameailable, was done by giving *special* bail, as it is called; or, if in the discretion of the court they thought it too trivial a case to require real sureties, the defendant was suffered to remain at liberty, by putting in nominal persons, called filing *common* bail, still keeping up the *supposition* that he was in the custody of the court, but only out upon bail. Whereas in the Common Pleas no such supposition of the defendant being in the custody of the court prevailed; and the intention of the process was originally very different, the operation of the attachment, or summons and distringas, being nothing more than to compel the *appearance* of the party; if he voluntarily appeared, the process ceased: and indeed, upon the first introduction to the *capias*, it was only as a punishment for the refractory disobedience of the defendant in not appearing to the former process. This appearance was entered in the proceedings of the court. There was a day called the *appearance* day, being the *quarto die post* after the return of the process. The use of the appearance was to shew that the defendant was in court to answer the charge against him: it had no other end to effect. After the introduction therefore of the *capias*, and the practice of taking bail, if the judges of the court, who exercised their discretion, thought the action not of sufficient importance to require special bail, they permitted the party to remain at liberty, and only requested him voluntarily to enter his *appearance*, so as to shew himself ready to answer the charge; and we find by the stat. of 12 Geo. 1. c. 29. that if this is not now done by the defendant after service of process in actions notailable, the plaintiff may enter an appearance for him. This seems to account for the difference of the practice in the two courts, in actions notailable,

able, by *common bail* being filed in one, and an *appearance* entered in the other.

12 Geo. 1. does not take away process by original, *quare clausum fregit*, or summons.

Bar. 407.

Reason why in declaration in C. B. defendant is sometimes attached, and sometimes summoned.

It may be proper to add one more observation upon the subject; namely, that the statute 12 Geo. 1. does not take away the ancient method of proceeding in the court of Common Pleas by original and distringas: it only prescribes a new mode by way of process against the *person*; but plaintiff may still proceed against the goods of the defendant by *pone* and distress, or *summons* and distress, as the case may be. If in trespass, or on the case, or such like actions arising *ex delicto*, the ancient process is by *pone*, or attachment and distringas; if in debt, covenant, or actions arising *ex contractu*, it is by *summons* and distringas; which is the reason why in the declaration in the Common Pleas, in the former actions, it is stated defendant was ATTACHED, and in the latter that he was *summoned* to answer plaintiff.

APPENDIX (F).

Forms of Process and Writs in King's Bench in Proceedings by Bill; as well in Cases where Common as where Special Bail is required.

Form of bill of Middlesex.

“**MIDDLESEX**, to wit.—The sheriff is commanded to take A. B. (*here insert John Doe or Richard Roe, if but one real defendant, varying the fictitious defendant's christian name from the real defendant's christian name*), if they be found in his bailiwick; and that he keep them safely, so that he may have their bodies before the lord the king at Westminster, on (*insert here any return you choose to make your writ of*), to answer C. D. in a plea of trespass; and that he may have there then this precept.

“By bill. Mansfield and Way.”

Notice.

“Mr. C. D. you are served with this process, to the intent that you may, by your attorney, appear (*if against* man

"man and wife, say, for yourself, and Mary your wife, or
 "as her christian name be,) in hismajesty's court of King's
 "Bench, at the return thereof, being the (*the day of the*
 "*month and year of return, unless same month, and then in-*
 "*stant sufficient*), in order to your defence in this action."

Trespas is sufficient in this court on all procefs where Remark.
 bail not required, except against bail on recognizance
 after judgment against the defendant, when the follow-
 ing *ac etiam* must be inserted, whetherailable or not,
 after the word *trespas*;

"And also to the bill of the said A. to be exhibited Ac etiam in
 "against the said B. in a plea of debt on recognizance, debt on recogni-
 "according to the custom of the court of our lord the zance.
 "king, before the king himself."

In allailable cases an *ac etiam* is inserted, according
 to the nature of the case, immediately after the word
trespas, and before the word *and*.—See forms thereof
infra.

The writ must have the attorney's name and day, Indorsed,
 month and year when sued out, indorsed on the back. how.

Ifailable, these words are to precede attorney's
 name, *on oath, bail, for (the sum sworn to)*.

This writ is only signed; for which purpose you make
 a præcipe for the office in manner following:

"Middlesex, to wit.—Bill for A. B. against C. D. If Præcipe.
 "ailable, you score under defendant's name thus, *C.D.*
 "returnable (*the return of writ*)."

Day, month, and } Ifailable, say—On oath, bail for Indorsed on
 year, attorney's } (*sum sworn to*), over day, month, and back.
 name. } year.

If defendant cannot be served before return with
 common procefs, or arrested onailable bill of *Middle-*
sex, make out an *alias* in form following:

"Middlesex, to wit.—The sheriff is commanded, as Alias bill.
 "before he was commanded, to take, &c. (*and so on*
 "verbatim

" verbatim as in former precedent); only if bailable (*notice to defendant to appear must be omitted, and an ac etiam inserted therein according to the nature of the case*)."

Præcipe for alias.

" *Middlesex*, to wit.—*Alias* bill for A.B. against C. D.

Indorsement.

Day, month, and year,
attorney's name, and
when bill sued out.

" Returnable (*return of alias*)."

If *alias* not executed, make out *pluries* as follows :

Pluries bill.

" *Middlesex*, to wit.—The sheriff is commanded, as "*oftentimes heretofore he hath been commanded, to take, &c. (as in bill of Middlesex)*."—If the *alias* or *pluries* are bailable, mention in *præcipe* when affidavit sworn, and when first writ taken out.

Præcipe for pluries.

Præcipe for office, same as before ; only, instead of *alias* bill, say *pluries* bill.

You may continue this writ for four terms, and if not executed, then sue out a new bill of *Middlesex* : pay for same in term or vacation as at first.

If defendant lives in any liberty in the county, then make out a *non omittas* bill of *Middlesex*, in form following :

Non omittas bill.

" *Middlesex*, to wit.—The sheriff is commanded, that " he do not forbear by reason of any liberty in his " county, but that he take (*as before on a bailable bill, alias or pluries*)."

Præcipe, same as before, only calling it *non omittas* bill for, &c.

Note.—In your *ac etiam*, in this court, it is the common practice to make sum double that sworn to.

Forms in C. B.

Forms of Process and Writs in Common Pleas.

Form of cap. ad respond.

" *George the Third, &c.*—To the sheriff of *Middlesex*, " greeting : We command you, that you take A. B. late " of

" of *London*, merchant, and John Doe, late of the same
 " place, gentleman, if they may be found in your baili-
 " wick, and safely keep them, so that you may have
 " their bodies before our justices at *Westminster*, on (*the*
 " *return*) to answer to C. D. in a plea; wherefore, with
 " force and arms, the close of the said C. at *London*,
 " they broke, and other wrongs to him did, to the great
 " damage of the said C. and against our peace, (*here in-*
 " *sert an ac etiam, if the action isailable,)* and have you
 " there this writ. *Witness*, Sir James Eyre Knight, at
 " *Westminster*, (*the teste, if in term, the first day of term;*
 " *if in the vacation, the last day of the preceding term*), in
 " the 12th year of our reign."

This writ hath the filazer's name of county where
 sued out; and if defendant is to be served therewith,
 you add a notice.

" Mr. A. B.

" You are served with this process, to the intent, that Notice,
 " you may, by your attorney, appear in his majesty's 21 Geo. 2.
 " court of Common Pleas, at the return thereof, being
 " the day of in order to your defence in this
 " action.

" *April 1795.*"

" *Middlesex*, to wit.—*Capias* for C. D. against A. B. Præcipe for cap.
 " late of *London*, merchant. *Trespas* at *Westminster*. ad respond.
 " Returnable (*the return*). where no bail
 " required.

" *May 1795.*"

" *Middlesex*, to wit.—*Capias* by continuance for C. D. Præcipe for cap.
 " against A. B. &c. [varying it according to the nature by continuance.
 " of the action].

" Return, &c.

" *June 1795.*"

There is no difference in the *capias* by continuance
 from the first *capias*.

You must take out *capias* by continuance in this manner,
 till defendant is arrested, or served with process. The
 sum sworn to must be indorsed on writ, together with
 attorney's name, day, month, and year when sued out.

Carry

Carry *præcipe*, writ, and affidavit, (if bailable,) to the filazer of the proper county, who will make out *capias*, or you may make it out yourself.

Præcipe for test.
capias.

" *Lincoln*, to wit.—*Testatum capias* for C. D. against
" A. B. late of, &c. and for 100*l.* on promise.

" Returnable, &c.

" Affidavit for 5*ol.*

" *June 1795.*"

Form of test.
cap.

" *George the Third*, &c.—To the sheriff of *Buckingham*, greeting: We command you, that you take A. B. late of, &c. if he shall be found in your bailiwick, and keep him safely, so that you may have his body before our justices at *Westminster*, on (the return), to answer to C. D. of a plea; wherefore, with force and arms, he broke the close of the said C. D. at *London*, and did other injuries to him, to the great damage of the said C. D. and against our peace, (or according to the nature of the action, as directed by the foregoing precepts): AND ALSO, that the said A. B. answer the said C. D. according to the custom of our court of the bench, of a certain plea, &c. as directed under head of *ac etiam*, according to the nature of the case: And whereupon our sheriffs of *London* returned to our justices at *Westminster*, at a certain day now past, that the said A. B. was not found in their bailiwick; whereas it is testified in our said court, that the said A. B. doth lie hid, and runs from place to place in your county, and have there this writ. Witness, Sir *James Eyre* Knight, at *Westminster*," &c.

If defendant lives in any liberty which sheriff cannot enter, as the *cinque ports*, &c. you must make out a *non omittas*.

Præcipe for non
omittas *capias*.

" *Northampton*.—*Non omittas capias* for C. D. against
" A. B. late of, &c. and also for, &c.

" Return, &c.

" Affidavit for 5*ol.*

" *June 1795.*

R. R."

Form of non
omittas.

" *George the Third*, &c.—To the sheriff of *Northampton*, greeting: We command you, that you do not omit, by reason of any liberty of the liberty of O. in your
" county,

"county, but that you take A. B. late of, &c. if he shall
 "be found in your bailiwick, and that you keep him
 "safely, so that you may have his body before our jus-
 "tices at *Westminster*, on (*the return*), to answer C. D.
 "of a plea, &c. as in *præcipes*, &c.; and also, that the
 "said A. B. may answer the said C. D. &c. as in *ac*
 "*etiams*, &c.: And whereupon you returned to our
 "justices at *Westminster*, at a certain day now past, that
 "the bailiff of the aforesaid liberty, whom you com-
 "manded, by virtue of our said writ to you thereupon
 "directed, to take the said A. B., gave you no answer
 "thereto, and have there this writ. Witness, Sir *James*
 "*Eyre Knight*, at *Westminster*," &c.

If defendant cannot be served or taken on the *testa-*
tum capias, or *non omittas capias*, you issue *continuances*,
 as you do on the common *capias*.

Forms of *Ac etiam*.

To answer A. B. in a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for 100*l.* debt, according to the custom of the court of our lord the king, before the king himself, if a bill of *Middlesex*; but if a *latitat*, say, according to the custom of our court before us. Ac etiam in debt on bond.

In a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for converting of the goods and chattels of the said A. B. to the value of 50*l.* according, &c. In trover.

In a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for detaining the goods and chattels of the said A. B. to the value of 500*l.* according, &c. Detinue.

In a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for breach of covenant to the damage of the said A. B. of 60*l.* according, &c. Covenant.

In a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for assaulting, beating, wounding, and evilly treating the said A. B. Assault.

A. B. to the damage of the said A. B. of 500*l.* according, &c.

If several defendants.

To answer A. B. in a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D., E. F., and G. H. for 100*l.* upon promises, according, &c.

For crim. con.

In a plea of trespass; and also to a bill of the said A. B. to be exhibited against the said C. D. for assaulting, and having criminal conversation with E. the wife of the said A. B., to the said A. B. his damage of 1000*l.* according, &c.

At the suit of executors.

In a plea of trespass; and also to a bill of the said A. B. and E. F. as executors of the last will and testament of G. H. deceased, to be exhibited against the said C. D. for 50*l.* upon promises, according, &c.

At the suit of an administrator.

In a plea of trespass; and also to a bill of the said A. B. as administrator of all and singular the goods, chattels, and credits which were of E. F. who died intestate, to be exhibited against the said C. D. for 50*l.* upon promises, according, &c.

At the suit of assignees of a bankrupt.

In a plea of trespass; and also to a bill of the said A. B. and G. H. as assignees of the estate and effects which were of E. F. a bankrupt, according to the form of the statutes, &c. to be exhibited against the said R. F. for 100*l.* upon promises, according, &c.

For foreign money.

And also to a bill of the said A. B. for 400*l.* of lawful money of Great Britain, in debt, being the value of 6000*l.* of gold and silver currency of the island of Antigua in the West Indies, to be exhibited, according, &c.

Directions of writs.

The above writs and process must be directed to the proper officer who has the execution thereof.

This in general is the sheriff, unless the writ issues to a county palatine, or the like; but some cities and towns have two sheriffs, and others only one, and the direction of the writ varies accordingly; care therefore must be had in this respect.

Cities

*Cities and Towns having two Sheriffs.*Cities and
towns where
two sheriffs.

Bristol,	Gloucester,	Norwich,
Chester,	Lincoln,	York, and town of
Coventry,	London,	Nottingham.

To these writs should be directed :

To the sheriff of our city of Coventry, and county of the same city.

To the sheriffs of our town and county of Nottingham.

To the sheriffs of our city of Bristol, Chester, &c.

Cities and Towns having only one Sheriff.

Where only one.

Cities.	Towns.
Canterbury,	Kingston-upon-Hull,
Exeter,	Newcastle-upon-Tyne,
Litchfield,	Pool,
Worcester,	Southampton.

To the sheriff of our town and county of Kingston-upon-Hull.

To the sheriff of our city of Litchfield, and county of the same city.

To the sheriff of our town and county of Newcastle-upon-Tyne.

To the sheriff of our town and county of the town of Pool.

To the sheriff of our town and county of the town of Southampton.

In all other counties, they are directed to the sheriff of Middlesex, of Surrey, and so forth, by the name of the county.

If

If they issue to a county palatine, direct them thus:

How directed to
county palatine.

To the chamberlain of our county palatine of Chester, or his deputy, greeting.

To the chancellor of our county palatine of Lancaster, or to his deputy there, greeting.

To the Reverend Father in God, by permission, Lord Bishop of Durham, or to his chancellor there, greeting.

Directions of
habeas corpus.

The above are the directions in cases of common writs or process; but where it is a writ of habeas corpus, which is to be directed to any inferior court for the removal of any proceedings, or to any gaoler for the bringing up of any prisoner, then the direction is different, according to the title of such court or officer, as,

Mayor's court.

To the mayor, aldermen, and sheriffs of London.

Sheriffs' court.

To the sheriffs of the city of London.

Marshalsea.

To the judges of our Palace-court of Westminster, and to each of them, greeting.

To marshal.

To the marshal of our prison of the Marshalsea, before us.

Warden.

To the warden of our prison of the Fleet.

To different
towns and cities.
Buckingham.

To the bailiff and burgesses of the town of Buckingham, in the county of Buckingham.

Bedford.

To the mayor, aldermen, burgesses, and recorder of the town of Bedford, in the county of Bedford.

Huntingdon.

To the mayor, aldermen, and burgesses of the borough of Huntingdon, in the county of Huntingdon.

Cambridge.

To the mayor and bailiffs of the town of Cambridge.

Suffolk.

To the mayor, recorder, and burgesses of the borough of St. Edmund, in the county of Suffolk.

Norwich.

To the mayor, aldermen, and sheriffs of the county of the city of Norwich.

To

To the mayor and recorder of our borough of Thetford, in the county of Norfolk. Thetford.

To our trusty and well-beloved H. Gwillim, Esq. chief justice, assigned to hold the sessions of pleas within the liberty or royal franchise of the Honourable and Right Reverend Father in God, by divine permission, Lord Bishop of Ely, within the Isle of Ely in the county of Cambridge; and to Thomas Go-to-bed Esq. chief bailiff of the said bishop, within the liberty of the said Isle, and to each of them greeting. Ely.

A few precedents are only given above, but in general it is the safest way to inquire how the writ should be directed before it is sued out, as it should be accurate.

APPENDIX (G).

Observations upon the Term ante Exhibitionem Billæ.

THERE certainly appears some confusion in the modern cases, respecting the real meaning of the phrase *ante exhibitionem billæ*. In the case of *Foster and Bonner*, Cow. 454, Lord Mansfield determined it to be the *filing of the declaration*, that the *declaration* was the *bill* meant thereby, and was the commencement of the suit; that the *latitat*, or bill of *Middlesex*, was merely process, or a summons to bring the party into court; and that any cause of action arising after the return of the process, and before the filing of the declaration, might be recovered in the action; which could not be the case, if such cause of action had arisen after the actual commencement of the suit, as he allowed in *Johnson and Smith*, Bur. 954. But with great deference, his lordship's reasoning in *Foster and Bonner*, appears by no means satisfactory. He says the action is not deemed to be brought till the *bill* filed, and *that* is the commencement of the suit: this I grant; but the question is, what

what bill is meant thereby? and whether his arguments prove it to mean the *declaration*. He adds, "the form of pleading a tender of amends or the statute of limitations shews this; for as in the Common Pleas, where the suit is by original, it is pleaded *ante impetrationem brevis*, so in this court it is said *ante exhibitionem billa*. The bill, therefore, is considered as an *original writ*, and it is the first step on the record. The want of a bill is the common error assigned, as the want of an original is, in the Common Pleas, and both are alike cured after verdict. If the plaintiff, therefore, duly proves a trespass or injury before the exhibiting the bill, it is sufficient." All this cannot be denied; but surely the very argument proves that the bill there alluded to cannot mean the *declaration*, for if it be as an original, and as in apposition to the *ante impetrationem brevis* in the Common Pleas, it must mean the original bill as in that court is meant the original writ. Again, the common error of the want of a bill cannot mean the want of a *declaration*. It is obvious, therefore, that the bill to support the above argument must mean the *original bill* or bill in trespass, which was the peculiar process of the court of King's Bench, always filed previous to the suing out of any bill of *Middlesex* or process; and which, though in progress of time it was omitted to be actually filed, is still supposed to be filed to give the court jurisdiction, and the want thereof, except after verdict, is even now error. Again, another argument used by the learned judge in that case is, that "where a defendant is brought into court by a bill of *Middlesex* upon a supposed trespass, in order to give the court a jurisdiction, the plaintiff may declare in whatever action, or charge him with whatever injury he thinks proper. So that (he adds) upon such a summons to bring the defendant into court, the plaintiff's *filing his bill* is most properly called the commencement of the suit." But he here seems to blend and confound two very distinct species of practice, which rest upon different foundations; the one standing upon the substantial ground of the *original* jurisdiction of the court, the other upon mere fiction or usurpation, founded upon the pretence, that when a defendant is once in the custody of the court, he is compelled to answer any charges that might be

be brought against him. This is nothing less than declaring *by the bye*; but in such case the party does not declare upon the original process; his charge is totally unconnected with it, that might have been at the suit of another person; there was no occasion when the defendant was in custody to file another original bill to warrant process in order to bring him into custody; of course, in such case, the bill or declaration must be the commencement of the suit; for, in truth, it is the first step taken, as there is no process or writ which ever issues in that particular action.

This reasoning, therefore, cannot be said to bear out the position, that by the *ante exhibitionem bille* is meant the filing of the declaration, in actions where the declaration is founded upon process previously issued. On the contrary, I conceive the origin of the term was a distinction between actions brought by *original* and by *bill*; that in the former, the *impetratio brevis* or suing out of the original writ, and in the latter, the *exhibitio bille*, or exhibiting the *original* bill or cause of complaint, was the commencement of the suit. That the phrases continued, when both the original writ in the Common Pleas and the original bill in the King's Bench were in ordinary cases deemed unnecessary; and that still, legally speaking, the terms are strictly applicable to the original writ or original bill, which are *supposed* to have been sued out.

This appears to be the strict interpretation, and it is for this reason, that whenever the suing out of the process becomes material, as in cases of the statutes of limitation, or of a tender, or the like, then the true time of issuing such process may be shewn, and such process becomes the commencement of the suit. So, in bailable actions, the writ with the *ac etiam* is considered as an *original* and as the commencement of the suit.

The summary of the above observations seems to be, that the *ante exhibitionem bille* properly means the exhibiting of the original bill *supposed* to be filed at the time when the bill of *Middlesex* or *latitat* issues, and that when that time becomes material, as also in bailable actions, it still relates to the time of issuing the

APPENDIX (G).

writ or of the supposed bill being filed, which is deemed the commencement of the suit; but when the time is not material, and the action is notailable, that then by the practice of the court it only now refers to the time of filing the bill or declaration, which must be in, or at of the term when the process is returnable, and that although no real cause of action existed at the time the process first issued, still if any accrue within the term, i. e. before the time when the declaration ought to be filed, the action is maintainable; but it must accrue within the term (3 D & E 627.), which of itself shews that the latter reason given in *Foster* and *Bonner* does not apply, inasmuch as no time seems to be there limited; but that if the cause of action arose at any time before the declaration filed, if within two terms, (the time allowed for declaring by the bye,) it was sufficient; but the contrary is the practice. For further information on the nature of the original bill, how it fell into disuse, &c. *Vide ante, Appendix A, B, C, D, E.*

APPENDIX (H).

FOR the matters referred to in this note, see the latter part of *Appendix E.*

APPENDIX (I).

FOR the history of the origin of the *ac etiam*, and in what cases now necessary, see *Appendix B* and *E.*

For the forms of writs inailable actions, and also of the different *ac etiams*, see *Appendix F.*

APPENDIX (K).

FOR the origin and history of bail in civil actions,
see *Appendix E*, where the subject is fully treated.

APPENDIX (L).

Form of Proceedings by Special Original in K. B.

"**L**ONDON, to wit.—If A. B. shall give you security
to prosecute, then put by sureties and safe pledges,
C. D. late of London, merchant; to shew, that
whereas (*setting out the whole of the counts as in a de-*
claration, to the damage of the said A. 30 l.) as he saith."

Proceedings by
original præcipe
in case.

Special *capias* returnable (*the return*) whensoever, &c.

"George the Third, &c.—To the sheriffs of Lon-
don (or wheresoever defendant is to be taken),
greeting: We command you, that you take C. D.
late of London, merchant, if he be found in your
bailiwick, and safely keep him, so that you may have
him before us in (*the return*) wheresoever we shall
then be in England, to answer A. B. in a plea, that
whereas (*setting out the whole, as if it were a decla-*
ration, according to the nature of the cause, to the damage,
&c.) as it is said; and, have you there this writ.
Witness at Westminster, (the teste
of the writ,) in the year of our reign,
" (*Filazer's name.*)"

Special *capias*.

If you choose to serve defendant with a copy, you add
a notice, as in bill of *Middlesex*; if to arrest him, get
warrant thereon.

If defendant cannot be taken on the *capias*, plaintiff
may sue out an *alias*, and after that a *pluries*, only adding
the

Alias.
Pluries.

the words to the *alias*, "*as formerly we have commanded you;*" to the *pluries* "*as oftentimes we have commanded you.*"

Testatum
Capias.

If defendant cannot be found in the county where your first writ issued, or where you intend trying the cause, then sue out a *testatum capias* against him into that county where he is to be met with, directed to that sheriff, and after the words "to the said A. B. his damage of 100*l.* as is said," add these: "*And our said sheriff of Middlesex, at a certain day now past, returned to us, that the said C. was not found in his bailiwick; whereas it is testified in our same court before us, that the said C. lurks and wanders up and down in your county; and have there this writ. Witness, &c. as see infra.*"

Præcipe for ori-
ginal in cove-
nant in B. R.

"*London, to wit.—Command A. B. and C. D. late of London, merchants, that justly and without delay they perform to E. F. the covenant made between the said E. F. and the said A. B. and C. D. according to the form, force, and effect of a certain indenture made between them thereof,*" &c.

Capias thereon.

"*George the Third, &c.—To the sheriffs of London, greeting: We command you, that you take A. B. and C. D. late of London, merchants, if they may be found in your bailiwick, and them safely keep, so that you may have their bodies before us on*
"*wheresoever we shall then be in England,*
"*to answer to E. F. in a plea, that justly and without delay they perform to the said E. F. the covenant made between A. B. and C. D. and the said E. F. according to the form, force, and effect of a certain indenture made between them thereof, &c. and in witness,*" &c.

Testatum capias
into Middlesex.

"*George the Third, &c.—To the sheriff of Middlesex, greeting: We command you, that you take A. B. and C. D. late of London, merchants, if they may be found in your bailiwick, and them safely keep, so that you may have their bodies before us on*
"*wheresoever we shall then be in England,*
"*to answer to E. F. in a plea, that justly and without delay they perform to the said E. F. the covenant*
"*made*

"made between them thereof, &c. And whereupon
 "our sheriffs of *London*, at a certain day now past, re-
 "turned to us, that the aforesaid A. B. and C. D. were
 "not, nor was either of them found in their bailiwick.
 "And thereupon it is justified in our said court before
 "us, that the said A. B. and C. D. lurk, wander, and
 "run about in your county; and have you there this
 "writ. Witness," &c..

"*Middlesex*, to wit.—Command A. B. late of
 "paviour, and C. D. late of the same place, brewer,
 "that justly and without delay they render to E. F.
 "50*l.* which they owe to and unjustly detain from
 "him, as it is said," &c..

Præcipe for ori-
 ginal in debt in
 C. P.

"*George the Third*, &c.—To the sheriff of *Middle-* Capias.
sex, greeting: We command you, that you take A.
 "B. late of paviour, and C. D. late
 "of the same place, brewer, if they may be found in
 "your bailiwick, and them safely keep, so that you
 "may have their bodies before our justices at *West-*
 "minster in three weeks of the Holy Trinity, to If in K. B. be-
 "answer to in a plea, that they render to fore us where-
 "him 50*l.* which they owe to and unjustly detain from soever, &c.
 "him, as it is said; and have there this writ. Wit-
 "ness," &c..

"*Middlesex*, to wit.—Appearance for A. C. at the Præcipe for ap-
 "suit of J. B. to a *capias* returnable on the morrow of pearance.
 "All Souls wheresoever, &c..

"J. B. Attorney."

*Form of Proceedings against Peers and Members
 of Parliament, by Original and Distringas, or
 Bill, Summons, and Distringas.*

"*George the Third*, &c.—To the sheriff of *Middle-*
sex, greeting: Command J. G. Esq. having privilege
 "of Parliament, that justly and without delay he render
 "to Mary Cobb, widow, administratrix of all and fin-
 "gular the goods and chattels, rights and credits,
 "which were of John Cobb, her late husband, de-
 "ceased, with the will of the said John Cobb annexed,

Præcipe for ori-
 ginal in debt
 against a peer.

"the sum of 1100 l. which he detains from her, as she
 "saith; and unless he shall so do, and if the said Mary
 "Cobb make you secure to prosecute her claim, then
 "summon by good summoners, the said J. G. that he
 "be before us on the next coming,
 "wheresoever we shall then be in *England*, to shew
 "wherefore he hath not done it; and have you there
 "then this writ. Witnefs," &c.

If proceedings
 by original.

Upon this *præcipe* the original writ is made out and
 directed to sheriff, who summons defendant, and then
distingas issues. For form of which, see *infra*.

If by bill.

But if proceedings be by *bill*, bill must first be filed, as—

Bill of Easter Term, 36 George 3. B. R.

See Appen-
 dix P. whether
 proceedings by
 bill lie against
 a peer.

"*Middlesex*.—Mary Cobb, widow, administratrix of
 "John Cobb; J. G. Esq. having privilege of Parliament.
 "Bond 1100 l."

Then writ of summons goes to the Sheriff as follows:

Writ of sum-
 mons to sheriff
 of *Middlesex*.

"George the Third, &c.—To the sheriff of *Middle-*
 "sex, greeting: We command you, that you cause to
 "be summoned J. G. Esq. he having privilege of Par-
 "liament, that he be before us at *Westminster* on
 "Wednesday next after one month from the day of
 "Easter, to answer unto Mary Cobb, widow, admini-
 "stratrix of all and singular the goods and chattels,
 "rights and credits, which were of John Cobb, her late
 "husband, deceased, with the will of the said John
 "Cobb annexed, in a plea, that he render to the said
 "Mary, as such administratrix as aforesaid, 1100 l. of
 "good and lawful money of Great Britain, which he
 "unjustly detains from her; and have you there then
 "this writ. Witnefs
 "at *Westminster*, the day of in the
 "year, &c.

"Mansfield and Way."

Then the *Distingas* issues,

Distingas
 thereon.

"George the Third, &c.—To the sheriff of *Middle-*
 "sex, greeting: We command you, that you distrain
 "J. G. Esq. he having privilege of Parliament by all
 "his lands and chattels in your bailiwick, so that
 "neither

"neither he, nor any one for him, do intermeddle
 "therewith until you have other command in that be-
 "half from us; and that you answer us for the issues
 "from the same, so that you have his body before us
 "at *Westminster* on Monday next after the morrow
 "of Ascension of our Lord, to answer Mary Cobb,
 "widow, administratrix of all and singular the goods
 "and chattels, rights and credits which were of John
 "Cobb her late husband, deceased, with the will
 "of the said John Cobb annexed, in a plea, that he
 "render to the said Mary, as such administratrix as
 "aforesaid, 1100*l.* of good and lawful money of Great
 "Britain, which he unjustly detains from her, to the
 "damage of the said Mary, as such administratrix as
 "aforesaid, of 20*l.*; and have you there then this
 "writ. Writens at *Westminster*,
 "the day of in the year of our reign.
 "Mansfield and Way."

If distringas in
 C. B. say, so
 that he be before
 our justices.

Wherefore, with
 force and arms,
 she broke the
 close of the said
 A. at to the
 great damage,
 or as the case
 may be.

If necessary, the *Testatum Distringas* then issues.

"George the Third, &c.—To the sheriff of *Dorset-*
shire, greeting: We command you, that you distrain
 "J. G. Esq. having privilege of Parliament by all his
 "lands and chattels in your bailiwick, so that neither
 "he, nor any one for him, do intermeddle therewith
 "until you shall have other command in that behalf
 "from us; and that you answer us for the issues of the
 "same, so that you have the body of the said J. G. be-
 "fore us at *Westminster* on Friday next after the
 "morrow of the Holy Trinity, to answer Mary Cobb,
 "widow, administratrix of all and singular the goods
 "and chattels, rights and credits, which were of John
 "Cobb, her late husband, deceased, with the will of the
 "said John Cobb annexed, in a plea, that he render to
 "the said Mary, as such administratrix as aforesaid,
 "1100*l.* of good and lawful money of Great Britain,
 "which he unjustly detains from her to the damage of
 "said Mary, as such administratrix as aforesaid, of 20*l.*;
 "whereupon our sheriff of *Middlesex*, at a certain day
 "now past, returned to us at *Westminster*, that the
 "said J. had not any lands or chattels in his baili-
 "wick, whereby he could distrain him to answer to
 "the said Mary, as such administratrix in the plea
 "aforesaid; and whereupon also, on the behalf of the
 "said Mary, it is sufficiently testified in our said court,
 "before

Testatum di-
 stringas.

"before us, that the said J. G. Esq. hath sufficient lands
 "and chattels in your bailiwick, whereby you may
 "distrain him to answer to the said Mary, as such ad-
 "ministratrix in the plea aforesaid; and have you there
 "then this writ. Witness

• at *Westminster*, in the 36th year of our reign.

"Mansfield and Way."

*Forms of Proceedings by original Quare Clausum
 and Summons, &c. in C. B.*

Proceeding by
 original quare
 clausum fregit.

The original writ is a common *capias*, as before shewn
 [Appendix F]; on this, sheriff summons defendant;
 and if he does not appear, the same kind of *distingas*
 and *testatum distingas*, if wanted, issues, as above shewn,
 against peers or members of Parliament.

APPENDIX (M).

*Of the ancient Mode of pleading Ore Tenus, and
 the Alteration therein.*

Proceedings
 originally ore
 tenus and in
 person.

FORMERLY, when the defendant was arrested, and
 brought into court upon the process that had issued
 against him, it was the duty of the plaintiff to deliver in
 his charge, to which the defendant answered, and the
 plaintiff replied *vivâ voce in person* in open court. The
 pleadings were then carried on by word of mouth;
 and the parties obliged personally to attend. But the
 statute of *Westminster* 2. which passed in the 13th
 year of the reign of Edw. 1. authorized the appoint-
 ment of *attornies*, who had full power in all pleas
 moved during the circuit until the same were deter-
 mined, or such attorney was removed. After that
 time, the personal attendance of the parties being
 dispensed with, they carried on the pleadings in the suit
 by their attornies; still however there were parol plead-
 ings delivered *vivâ voce*; and it is said in a former note
 [Appendix B] (upon the authority of Mr. Crompton)

When attornies
 allowed.

that

that these *viva voce* proceedings continued until after the reformation; but I greatly doubt that, and am inclined to think that they were reduced to writing in a much earlier period. It is said by some, so early as in the reign of Edw. 3. and there is certainly good reason to conclude, from the alteration in the pleadings about that time, that they were not hastily spoken, but rather deliberately penned. It is clear however, that the practice of delivering pleadings *ore tenus* continued longer in the Common Pleas than in the King's Bench. When this mode of pleading was discontinued in the King's Bench, the practice was, that if the defendant appeared personally at the return of the writ, the plaintiff was to declare within three days. If he appeared by attorney, he was to declare within the term. For this reason there was never any continuance from the appearance-day to the time of declaring, nor any precedent of *libertas narrandi*; and so is the practice of declaring within the term wherein the writ is returnable even at this day. But the parties might at that time have obtained by consent a day before declaration for the plaintiff to declare in, which was called *dies datus prece partium*. But in that case, if the defendant did not appear at the day given, since there was no declaration, the plaintiff could not have judgment, but was obliged to bring the defendant in again by process, that he might declare against him; for none could have judgment except upon complaint exhibited to the court against defendant whilst in court. When the plaintiff declared, the defendant in the King's Bench generally had of course an imparlance for time to plead till the next term, and the bill or declaration was entered on a roll. This practice in the King's Bench created a similar one in the Common Pleas; for when the plaintiff declared, though it was *ore tenus*, it was minuted by the prothonotary, and likewise the prayer or permission to imparl; then in conformity to the King's Bench, they entered a declaration on a roll which was called the imparlance roll; this was done the first term. They then entered the next term the further proceedings to issue which formed the plea roll; from which the *nisi prius* or issue roll was made up; upon the back of which the verdict was entered, which was afterwards transcribed upon the plea roll, and thereon judgment was entered. But in time, these proceedings were changed, the pleadings were delivered in paper

When *viva voce* proceedings discontinued.

Gilbert's origin of King's Bench.
Reeve's History of English Law.
Gilb. Hist.
C. B. 44.

Lasted longer in C. B.

8 Eliz. c. 2.

Gilb. Hist.
C. B. 41.

Meaning of *dies datus prece partium*.

Of the imparlance roll.

Gilbert's origin.
K. B. 314.

Plea roll.

Nisi prius, or issue roll.

Cause of introduction of paper pleadings.

How issue made up.

In K. B.

In C. B.

Law proceedings in Latin.

In French.

In English, but records in Latin.

The whole now in English.

paper to each party; and if special, made out by the clerk of the papers in King's Bench; from them the *nisi prius* roll was made up, and the judgment entered thereon. The reason why paper proceedings were introduced instead of the rolls of the court was, on account of the increase of business in the courts; and that it was not possible for the prothonotaries to enter the pleadings upon the roll, and therefore the attornies were permitted to deliver their pleadings in paper one to another. Hence it is, that these paper proceedings are looked upon as the original materials to settle the *nisi prius* roll. In the Common Pleas the issues are now made up by the attornies themselves; in the King's Bench, if any special pleadings, they are prepared by the clerk of the papers, and called the paper-books; and if no special pleadings, they are, as in the Common Pleas, called issues, and made up by the attornies. Possibly the difference in the two courts in their practice in this respect might arise from the cause above hinted at, viz. the multiplicity of suits which came into the Common Pleas, and which rendered it impossible for the prothonotaries to transcribe, and make out the pleadings; for that court certainly on its first establishment, and for a length of time afterwards, had infinitely a greater quantity of business than the King's Bench.

Before the time of the Conqueror, law proceedings were in Latin. In his time they were ordered to be in French; which being a language introduced by the Normans, and little known in this country, created great confusion as appears in the preamble of the statute 36 Edw. 3. sec. 1. c. 15. which enacts, that the pleadings shall be in *English*, but entered and inrolled in *Latin*, which was reviving the ancient usage; and this practice continued till the 4 Geo. 2. c. 26. when they were directed to be recorded and engrossed in the *English* language.

APPENDIX (N).

Of the Difference in making up the Records in the two Courts, and Forms of Venires.

IN order to understand the reason of the different parts of the *nisi prius* record, so far as relate to the jury process, it is necessary to be acquainted with the origin of trials at *nisi prius*; for which see the next note [Appendix O]. At present we shall only account for the difference of the records in the two courts, why the *placita* is omitted in the *nisi prius* roll of the Common Pleas, while it is inserted in that of the King's Bench.

Reason why
placita omitted
in Common
Pleas roll and
not in K. B.

To explain this it will be necessary to consider in what manner, after issue is joined, and the *venire* and *distingas* made returnable, the *continuances* are entered in the two courts.

If it be an issuable term, the *venire* is made returnable the last day of the term, without any *nisi prius* in it, as it anciently was [see Appendix O]; and from that day the *distingas* is tested with a *nisi prius*, returnable with a day in bank; if issue be joined, and they do not go to trial the same term, then they award a *venire* on the roll, returnable the same or the next term; and if they do not go to trial, they continue the process by a *vice comes non misit breve*; and then there is on the roll a new *venire* awarded till the vacation, when they go to trial; and when they are going to trial, they take the roll and enter the *continuances* to the *distingas*, which award of the *distingas* is never entered on the plea roll, but only at the first day of next term after the assizes, when the *postea* is returned, they enter it *postea continuato inde processu*, which is a recital of the continuance warranted by the *nisi prius* roll. The reason of this practice is, that if they had entered the award of the *distingas* on the plea roll, and had not gone to trial, they must from thence award an *alias* and *pluries distingas*, which would have obliged the jury to come in term, and in a term not issuable. By this practice, they saved all trouble and expence of that nature, and yet

How venire
awarded.

Distingas.

How entered
on the roll.

What kind of
continuances.

Of the postea
continuator
inde, &c.
Use of that
entry.

How continuances formerly entered on plea roll.

Now generally on nisi prius roll.

Reason why no placita in C. B.

But one in K. B.

Of the ancient continuance roll.

yet they continued the acts of the court as well; for *postea continuato inde processu*, shews on the plea roll, that the last award of the *venire* in the former term, was continued to the day in bank by the process, viz. by the *distringas*; and the award of the *distringas* was not necessary to be entered, since it was an act relating to a trial out of the court, and not in the court itself; and therefore preparatory to the trial, was formerly entered on the *nisi prius* or issue roll, so called, because on it the pleadings were entered to the issue at that time; and as it was unnecessary to enter the continuance on the plea roll, so it was not expedient, because such continuance would have embarrassed the parties and jury; and therefore a general entry was thought sufficient on the *nisi prius* roll: the declaration and pleadings are now entered to the issue joined, together with the first award to the *venire*. But to save the trouble of such entry of continuances, they enter the *placita* of the term in the vacation, when they go to trial, at the bottom of the *nisi prius* roll, between the award of the *venire* and the *jurat*; and this shews the judge of assize, that it was an issue continued to the last term, and is a warrant to the officer above to continue the *venire* until the time of issuing the *distringas*. Hence, in the Common Pleas, they make no *placita* at the bottom when they go to trial the *same term issue is joined*; for that would apparently be unnecessary since such *placita* came instead of the continuances; but in the King's Bench, they always entered the *placita*, though they went to trial the same term; for anciently the continuances in that court were from one day to another day in the same term. Besides which, it is to be noted, that in the Common Pleas, there was anciently a *continuance roll* for the jury process; so that after the *venire* was awarded, and the jury process was continued from term to term, they entered the continuance on a roll of that day to which such process was continued, entering up the style of the court on the top of such roll, numbering the roll; and so, when continued to a subsequent term, they entered on the continuance roll of that day in the same manner; and when the *postea* came up, then their entry was made in this manner: *postea continuato processu præd. inter partes præd. per jur. ponit inde inter eos in respectum huc usq. ad tunc diem scil. in Octab. Sancti Trinitat. nisi Justiciar. prius, &c.*

And

And when such records were sent for by writ of error Use thereof
at the end of the judgment, they sent the *placita* of the
particular times of continuances to warrant that part of
the roll that mentions the *continuato inde processu*; and
this is evident from Rastall's Entries, title Error, in a
roll in the 5, Edw. 4. where the very number of each
roll of continuance is entered at the foot of the judg-
ment. After 32 Hen. 8. c. 30. the continuance roll When abolished
was dropt; because, by that statute, all discontinuances ed.
were cured after verdict; and therefore they only entered
on the plea roll the award of the *venire*, which
they continued as before-mentioned, by a *vic. non misit*
breve; but now that is dropt, and they only enter *possea* Why.
continuato inde processu inter partes prad. entering the
verdict returned on the *possea*; and they need not, on
the foot of the record, enter any continuance, since the
want of a continuance is cured after verdict; but they
enter the *placita* and the award of the *distringas* on the
nisi prius roll, to be an authority to the judge to try the
cause.

The day at *nisi prius*, and in bank, are, in consideration Use and operation of the
of the law, the same; because the writ of *nisi prius*, postea.
which gives authority to the judge to try the cause in the
country, is instead of the court; and therefore the *possea*,
certified by him on the day of bank, is the same as if
the jury had come up to the court; and this (as was
said) is for the ease of the subject, that the jury and
witnesses may not be brought out of their proper county.

If a *venire* is awarded, and they do not go to trial the How continu-
next assizes, but it lies for several terms, the continuance ances now to
may be made by a *vic. non misit breve*; but if a *nisi prius* be made.
be awarded, and some of the jury appear, and the panel
be not full, so that the trial is not carried on, they only
enter those of the jury that appeared, *et alii non venerunt*,
ideo respectuentur to the next term pro defecto jur.; and
at the day in the next term, they award an *alias distrin-*
gas to the next assizes, with a *nisi prius* until the next
term. Gilb. Hist. C. P.

Form of the awarding of the *Venire*.

Where there are two or more issues joined, then after
the words, "and the said plaintiff doth the like," add
these: "Therefore as well to try this issue as the said
" other

Forms of
awards of *ve-*
nire
Where two or
more issues.

"other issue above joined, the sheriff is commanded
 "that he cause to come here in fifteen days of Saint
 "Martin twelve, &c. by whom, &c. and who neither,
 "&c. to recognize, &c. because as well," &c.

If defendants
 plead separate-
 ly.

How to make up an issue where the defendants plead
 separately.

In this case, you add to each copy of the issue, the
 two pleas, and join the *similiter* to each, and then say:
 "Therefore as well to try the issue above joined against
 "the said John Doe, as the said other issue above joined
 "against the said Richard Roe, the sheriff is commanded
 "that he cause to come here, in," &c. (as above).

If one lets judg-
 ment go by de-
 fault.

Go to the end of the plea pleaded by the defendant,
 and add the *similiter* thereto; then say, "And the said
 "Richard, in his own person, comes and defends the
 "wrong and injury, when, &c. and says nothing in bar
 "or preclusion of the said action of the said John, by
 "which the said John remains therein undefended
 "against the said Richard; for which the said John
 "ought to recover against the said Richard his damages
 "by reason of the premises; but because it is unknown
 "to the court here what damages the said John hath
 "sustained by the means aforesaid; and because it is
 "also at present unknown to the court here, whether
 "the said Richard will be convicted of the premises
 "upon which the above issue is joined between the said
 "John and the said Richard or not; and because it is
 "necessary and convenient, that there be but one taxa-
 "tion of damages in this suit, therefore let the giving
 "of judgment in this behalf be stayed until the said issue
 "between the said John and Richard be determined;
 "and as well to try the issue above joined between the
 "said John and Richard, as to inquire against the
 "said Richard what damages the said John hath
 "sustained in this behalf, the sheriffs are commanded,
 "that they cause to come here in eight days of the
 "Purification, twelve, &c. by whom, &c. and who
 "neither, &c. because as well," &c.

Unica taxatio.

How if issue in
 county palatine;
 of the *mittimus*.

When the issue is in a *county palatine*, where the king's
 writs do not run, and must be tried by a jury of the pa-
 latinate, the record is sent down by *mittimus* to the
 judges to be tried; and the award of the *venire* and
mittimus

mitti
 the l
 " of
 " pa
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mittimus are in the following form, with a suggestion at the beginning: "Therefore let a jury be made thereof; and because the issue aforesaid, between the parties above joined, ought to be tried by men of the county palatine of Lancaster; that is to say, of the body of the said county, where the writ of our said lord the king doth not run, and not elsewhere; therefore to try the issue aforesaid, between the parties above joined, let the record of the plaint aforesaid be sent to his majesty's justices of the said county palatine of Lancaster; so that the same justices, by his said majesty's writ of that county, to be duly made out, and to the sheriff of the same county directed, do command the said sheriff that he cause twelve good and lawful men, of the body of the said county of Lancaster, to come before the justices, at their next general sessions of assize to be holden for the said county, after the said record shall be delivered to them, each of whom, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. And when the verification and issue aforesaid shall be there made and tried, that then the said justices shall send the record of the plaint aforesaid, together with every thing that shall be done thereupon before them, in his said majesty's court, there to our said lord the king at Westminster, at a certain day which the said justices shall appoint; the said parties to be in the same court, there to hear a judgment thereupon."

The Award of a *Venire* on a Welch Issue into the next English County, is in the following Form:

"And because the issue aforesaid, between the parties above joined, ought to be tried by men of the next English county to the said county of _____, and not elsewhere; and because the county of _____ is the next English county to the said county of _____; therefore let a jury of the said county of _____ come thereupon before our lord the king at Westminster, on _____ (some return day before the trial), and who neither, &c. to recognize, &c. because as well, &c. the same day is given to the said parties there."

Award of venire on a Welch issue.

In the record on a Welch issue, the *jurata* and *venire*, *distingas*, &c. are made up of the next English county into

into which the *venire* is awarded, as if the *venire* were laid in that county.

A Suggestion that one of the *Sheriffs* is interested, &c.
by the *East India Company*:

Suggestion by
East India Com-
pany that one of
the *sheriffs* is
interested.
Venire to the
other *sheriff*.

" And hereupon the said United Company say, that
" W. S. and R. W. Esqrs. are *sheriffs* of *London*;
" and that the said W. S. one of the said *sheriffs*, in
" his own right, is proprietor, and hath interest in and
" to a share and proportion of the principal stock of
" the said United Company, to the value of £. ,
" and is a member of the said United Company, and
" this the said United Company are ready to verify;
" and for this cause, the said United Company pray a
" writ to be directed to the said R. W. Esq. the other
" *sheriff* of *London*, to cause to come twelve, &c. to
" try the several issues between the said parties; and
" because the said Francis doth not deny the afore-
" said allegation of the said United Company, but
" acknowledgeth the same, it is granted to them, &c.
" Therefore let a jury, &c."

Suggestion that the *Sheriff* is of Kin to the Defendant.

Suggestion that
sheriff is of kin
to defendant.

Venire to coro-
ner.

" And hereupon the said A. B. says, that I. W. Esq.
" is *sheriff* of the said county of *E.* and that the said
" C. D. is of kin to the said I. W. in this, that one
" I. D. junior son of the said C. D. married and took
" to wife one I. W. who is yet alive, the daughter of
" the said I. W. *sheriff* of the county aforesaid; and for
" this cause, he prays a writ of our lord the king of
" *venire facias*, to be directed to the coroner of the
" said county of *E.* and because the said C. D. doth not
" deny the aforesaid allegation of the said A. B. it is
" granted to him, &c. Therefore it is commanded to
" the coroner of the said county of *E.* that he cause to
" come here twelve, &c. &c."

Suggestion that the *Sheriff* and Coroner are Parties, and
Venire to Elifors:

Suggestion that
sheriff and co-
roner are parties.
Venire to Eli-
fors.

" And hereupon the said Anthony says, that A. B.
" and C. D. now *sheriffs* of the city of *Coventry* and
" county of the same city, are bailiffs of the city of
" *Coventry* aforesaid, and therefore parties to the
" matter aforesaid, above between him the said Anthony
" and

"and the said Thomas, put in issue, and that Simon
 "Burton, now coroner of the said city of *Coventry*
 "aforesaid, and therefore likewise a party to the said
 "matter above, between the said Anthony and the said
 "Thomas as aforesaid, put in issue; and the same
 "Anthony prays a writ of the lord the king, to be
 "directed to two discreet and indifferent persons,
 "within the said county of the city of *Coventry* afore-
 "said residing, by the court here to be elected, to cause
 "to come twelve free and lawful men of the neighbour-
 "hood of *Wichen*, in the said county of the city of
 "*Coventry* aforesaid, to try the issue aforesaid, between
 "the parties aforesaid above as aforesaid joined: and
 "because the said Thomas Laurence doth not deny the
 "allegation aforesaid, therefore E. H. and A. L. (with
 "the agent of the parties aforesaid by the court here
 "elected and named) are commanded that they cause
 "to come before the lord the king at *Westminster* on
 "next after twelve, &c. by whom, &c.
 "and who neither, &c. to recognize, &c. because as
 "well, &c. The same day is given to the parties afore-
 "said there," &c.

Where Party died after one *Venire*:

"Therefore the sheriff is commanded that he cause
 "to come before the lord the king, from the day of
 "St. Michael, in three weeks wheresoever, &c. twelve,
 "&c. by whom, &c. and who neither, &c. to recog-
 "nize, &c. because as well, &c. The same day is given
 "to the parties aforesaid, &c. Before which day, to wit,
 "on the day of in the year of the reign of
 "the said lord the now king, the said Theodore died,
 "and the said James survived him; and now at this
 "day, before the said lord the king at *Westminster*,
 "comes the said James and Walter by their attornies
 "aforesaid, and the sheriff aforesaid hath not returned
 "the said writ thereof, nor done any thing therein:
 "therefore, as before the sheriff of the county afore-
 "said, is commanded that he cause to come before
 "the said lord the king in the octave of St. Hilary,
 "wheresoever, &c. twelve, &c. by whom, &c. The
 "same day is given to the parties aforesaid, &c."

Suggestion of
 death of party,
 after awarding
 one venire and
 another award-
 ed.

Verdict set aside, and *Venire de novo* awarded:

"And hereupon the record and verdict aforesaid
 "being read and heard, it seems to the justices here,
 "that
 "Y y 2

Verdict set aside
 and venire de
 novo awarded.

“ that the jurors aforesaid have misbehaved themselves
 “ in giving the verdict aforesaid, so that that verdict is
 “ idle and void in law. Therefore it is considered that
 “ the verdict aforesaid be held as idle and void, and had
 “ for nothing; and the process against the jurors first
 “ impannelled being omitted, and that panel being
 “ entirely withdrawn, the sheriff is commanded that he
 “ cause to come anew here, in the octave of the Puri-
 “ fication of the Blessed Virgin Mary, twelve, &c. by
 “ whom, &c. and who neither, &c. to recognize, &c.
 “ because as well,” &c.

APPENDIX (O).

Of the Assizes and Trials at Nisi Prius.

Institution of
 justices in eyre.

1 Reeve's Hist.
 Law, 52.

Their power.

Whence de-
 rived.

FROM the multiplicity of business which flowed into the courts of *Aula Regis* and *Exchequer*, the grand justiciary and his assessors on the Bench, soon found themselves fully occupied; and as the application to these courts became more frequent, it was judged necessary, both in aid of themselves, and in relief of suitors, to erect some other tribunal of the same nature. Accordingly justices were appointed to go *itiner*a or circuits through the kingdom, and determine pleas in the several counties. To these new tribunals was given a very comprehensive jurisdiction. As they were a sort of emanations from the *Curia Regis* and *Exchequer*, and were substituted in some measure in their place, (except with the reservation of appeal thereto,) they were endowed with all the authorities and powers of those courts. These justices *itinerant* or *errant*, in their several *itiner*a or *eyres*, held plea of all causes whether civil or criminal, and in most respects discharged the office of both the superior courts. The characters of the persons entrusted with this jurisdiction were equal to the high authority they exercised; the same persons who were justices in the king's court being (amongst others) justices *itinerant*. They acted under the king's writ in nature of a *commission*, and they went generally from

from seven years to seven years, though their circuits sometimes returned at shorter intervals. Their circuits became a kind of limitation in criminal prosecutions, as no one could be indicted for any thing done before the preceding *eyre*.

Circuits when held.

It is not easy to determine the exact period when this establishment of justices *itinerant* was first made. It has long been the common opinion that they were first appointed in the great council held at Nottingham, or as some say at Northampton, in the 22d year of Henry 2. *anno Dom.* 1176, when the king, by the advice of the great council, divided the realm into six circuits, and sent out three justices in each to administer justice.

At what time justices in eyre first established.

The counties assigned to each of these circuits were as follow: to one, the counties of *Norfolk, Suffolk, Cambridge, Huntingdon, Bedford, Buckingham, Essex, Hertford*; to another, *Lincoln, Nottingham, Derby, Stafford, Warwick, Northampton, Leicester*; to another, *Kent, Surry, Southampton, Sussex, Berks, Oxford*; to another, *Wilts, Dorset, Somerset, Devon, Cornwall*; to another, *York, Richmond, Lancaster, Copland, Westmorland, Northumberland, Cumberland*.

Kingdom divided into six circuits.

About three years afterwards the kingdom was parcelled out into four circuits only, the county of *Middlesex*, which before was not noticed, was then included, and more justices assigned to each. But they were since again divided into six circuits as they are at this day. The criminal jurisprudence of the country being found very defective, from the great delay of justice in criminal cases, as all trials of that kind were obliged to be deferred till the justices *itinerant* came into the county, commissions used to be occasionally issued, empowering certain justices therein named to make a *delivery of the gaol* specified in the commission, that is to examine into the offences of all the prisoners therein, and to discharge, continue in custody, or punish them according to their several crimes. The exact time when this practice commenced is not ascertained. It had been a very ancient custom among the Normans, both in their own country and in France, to try titles to land, and other questions, by *duel*. When William had ordained that this martial practice of his own country should be observed here in *criminal* trials, it became very easy

Then into four.

Afterwards into six.

Delay in criminal cases, from circuits being held seldom.

1 Reeve, 57.

Origin of commission of gaol delivery.

Of the trial by duel or battle.

- to introduce it in *civil* cases; and, being only used in the *Curia Regis*, it had not, among the other novelties of that court, as it certainly would have had in the county court, or any other of the ancient tribunals of Saxon original, the appearance of so singular an innovation.
- Nature thereof.** With all its absurdity, this mode of trial was not without some marks of a rational reliance on testimony and vouchers for the truth of what was in dispute; for it was never awarded without the oath of a credible witness, who would venture his life in the duel for the truth of what he swore. "I am ready," says the party litigant "to prove it by my freeman John, whom his father on his death-bed had enjoined, by the duty he owed him, that if at any time he should hear of a suit for this land, he should hazard himself in a *duel* for it, as for that which his father had *seen and heard*."
- Oath necessary.**
- Form thereof.**
- 1 Recv, 82.** Thus the champion of the demandant was such as might be a fit witness, and on that account the demandant could never engage in the combat himself; but the other party, who was defendant or tenant in the suit, might engage either in his own person or by that of another.
- Who might be parties.**
- In what cases, and**
- In all matters relating to landed disputes.** It is difficult to say what matters were at one time submitted to this mode of trial. Perhaps, at first, all questions of fact might, at the option of the demandant, have been tried by battle. In the reign of Henry 2. it was decisive in pleas concerning freehold, in writs of right, in warranty of land, or of goods sold, debts upon mortgage or promise, sureties denying their suretyship, the validity of charters, and questions concerning services. But notwithstanding the general bent of this people to admit the propriety of a trial so suitable to their martial genius, there must have been men of gravity and learning among them at all times, and persons of that character would always reprobate so ineffectual and cruel a proceeding.
- How changed into trial by jury.**
- 2 Recv, 83.**
- Which was sometimes called assisa.** As men became more civilized, a change was effected; and we find in the reign of Henry 2. that many questions of fact relating to property were tried by twelve *liberos et legales homines juratos* sworn to speak the truth, who were summoned by the sheriff for that purpose. This tribunal was in some cases called *assisa*, from *assidere*, as it said, because they sat together: though

though it is most probable, and indeed seems intimated by the manner in which Glanville often expresses himself, that it was emphatically so called from the *assisa* as the laws were then termed, by which the application of this trial was in many instances ordained. On other occasions this trial was called *jurata*, from the *juratos* or *juratores* who composed it.

What assisa properly meant.

Although instances might have occurred before of trial something similar to that of trial by jury, yet it was not till the reign of Henry the Second that the present trial by jury became general. It seems as if this law called *assisa* ordained that all questions of *seisin* of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth; and that in questions of *right* of land, the tenant might elect to have the matter tried by twelve good and lawful *knights*, instead of the duel. It appears that some incidental points in a cause, that were neither questions of mere *right* nor of *seisin* of land, were tried by a recognition of twelve men; and that in all these cases, the proceeding was called *per assisam* and *per recognitionem*; and the persons composing it were called *juratores*, *jurati*, *recognitores assise*, and collectively *assisa et recognitio*, only the twelve jurors in questions of mere *right*, being knights, were distinguished with the appellation of *magna assisa*, which is the case at this day in trials on a writ of *right*. Thus far have we shewn the nature of this species of trial by jury called *assisa*, and to what causes it related. Juries were also used in other cases not called *assisa*, as in questions of property not relating to land, in which actions the proceedings were said to be *per juratam patriam*, or *vicineti*, *per inquisitionem*, *per juramentum legalium hominum*; and this in criminal as well as civil matters.

Operation thereof.

Recognition, what.

Magna assisa, what.

Juries used in other actions, what then called.

The above observations were thought necessary, in order that the student might understand the true meaning of the word *assize*, and the nature of the commission of assize, and the office of judge of assize.

In the reign of Henry the Third, in order to render the proceeding by assize more expeditious, and not to delay the inquiry until the coming of the justices in eyre, who we find seldom went their circuits, other justices

Establishment of judges of assize.

Origin of associates with them.

were appointed to go circuits once every year to take assizes; they acted in this respect under the king's commission, called the Commission of Assize, and the Justices, were denominated Judges of Assize. To these justices were *associated* the knights of the county, who with them took the assize; and this is probably the origin of the present *association* in the commission of assize.

Of the commission of oyer and terminer.

In ancient times, when any particular outrage or misdemeanor had been committed, a certain writ used to issue *ad audiendum et terminandum* such offence, since called the Commission of Oyer and Terminer, which was directed to any justice, or even private person, at the suit of the party requiring, or the discretion of the officer granting it; but in the reign of Edward 1. it was ordained by statute, that this writ should not be granted before any justices except justices of either bench, and justices in eyre, unless in cases of particular enormity, where the king *ex necessitate rei* should think fit to grant it.

I mention this, because now the justices of assize act under the commission of oyer and terminer.

Of trials at nisi prius, 13 Ed. 1. c. 30.

In this same reign of Edward 1. passed the statute of *nisi prius*, as it is called. Indeed, before this time, the *nisi prius* clause was not altogether unknown; for as great expence was occasioned to the parties in bringing up witnesses and the like, from distant parts to Westminster, on the trial of trifling causes, a practice very early obtained, of *continuing* the cause from term to term in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if they did, they had jurisdiction of the cause. *Semper dabitur dies* (says Bracton, lib. 3. tr. 1. c. 11. f. 8.) *partibus a justiciariis de banco sub tali conditione* “*nisi justiciarii itinerantes prius venerint ad partes illas.*”

Clause of nisi prius of earlier origin;

but now inserted in different parts of the process.

But by the statute of *nisi prius* in the reign of Edward 1. justices of assize were empowered to try common issues in trespass and other less important suits, with directions to return them (when tried) into the court above, where alone the judgment should be given. And as only the trial and not the determination of the cause

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cause was now intended to be had in the court below, therefore the clause of *nisi prius* was left out of the *conditional continuances* before mentioned, and was directed by the statute to be inserted in the writs of *venire facias**; that is, "That the sheriff should cause the jurors to come to *Westminster* (or wheresoever the king's court should be held) on such a day in Easter and Michaelmas terms: *Nisi prius*, unless before that day the justices assigned to take assizes shall come into his said county." By virtue of which the sheriff returned his jurors to the court of the justices of assize, which was sure to be held in the vacation before Easter and Michaelmas terms, and there the trial was had.

Of the *venire*.

Nature of *nisi prius*; clause therein.

But an inconvenience attended this provision; principally because as the sheriff made no return of the jury to the court at Westminster, the parties were ignorant who they were till they came upon the trial, and therefore were not ready with their challenges or exceptions. For this reason, by the stat. 42 Edw. 3. c. 11. the method of trials by *nisi prius* was altered; and it was enacted, that no inquests (except of assize and gaol delivery) should be taken by a writ of *nisi prius* till after the sheriff had returned the names of the jurors to the court above. So that now in almost every civil cause, the clause of *nisi prius* is left out of the writ of *venire facias*, which is the sheriff's warrant to return the jury, and is inserted in another part of the proceedings.

Inconvenience of *nisi prius* being in *venire*.

How altered,

The present practice is to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz. Hilary or Trinity terms, which, from the making up of the issues therein to be tried at the assizes, are called *issuable terms*; and he returns the names of the jurors in a *panel* (a little pane or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore not appearing at the day, must unavoidably make default; for which reason a compulsive process is now awarded against the jurors, called in the Common Pleas a writ of *habeas corpora juratorum*, and in the King's Bench a *distingas*, commanding the sheriff to *have their bodies*, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. The entry therefore on the

and now inserted in *distingas* or *habeas corpora juratorum*.

Panel of jurors, what.

* For further information on this subject, see Gilb. Hist. C. B. 77.

Present form of
entry of nisi
prius clause or
roll.

Operation
thereof.

3 Blac. Com.
354.

Of the different
commissions
judges on cir-
cuits act under.

Of the associate.

The non omnes
clause.

3 Blac. Com. 59.

roll or record after the *venire* is, "that the jury is
" *respite*d through defect of the jurors till the first day
" of the next term, then to appear at *Westminster*,
" unless before that time (*nisi prius*) viz. on Saturday
" the 23d of February, the justices of our lord the king
" appointed to take assizes in that county shall have
" come to *Buckingham* (that is to the place assigned
" for holding the assizes)." And thereupon the writ
commands the sheriff to have their bodies at *West-*
minster, or *before the said justices of assize*, if before
that time they come to *Buckingham*, viz. on the 23d
February aforesaid. And as the judges are sure to come
and open the circuit commissions on the day men-
tioned in the writ, the sheriff summons the jury to
appear at the assizes, and there the trial is had be-
fore the justices of *assize* and *nisi prius*, among whom
are usually two of the judges of the courts of *West-*
minster, the whole kingdom being divided into six
circuits for this purpose. Thus we may observe that
the trial of common issues at *nisi prius*, which was in its
original only a collateral incident to the original bu-
siness of the justices of assize, is now by the various re-
volutions of practice become their principal civil em-
ployment: hardly any thing remaining in use of the
real *assizes* but the name.

The judges upon their circuits now sit by virtue of
five several commissions, the origin and nature of which
we have above shewn, and how they were respectively
acted upon. 1. The commission of the *peace*, as con-
servators of the peace generally. 2. A commission of
oyer and terminer. 3. A commission of general gaol
delivery. 4. A commission of *assize*. 5. That of *nisi*
prius. These commissions are constantly accompanied
by writs of association, in pursuance of the statute of
Edw. 1. and 2. whereby certain persons (usually the
clerk of assize and his subordinate officer, called from
thence the judge's associate) are directed to associate
themselves with the justices and serjeants, and they are
required to admit the said persons into their society, in
order to take the assizes, &c. that a sufficient supply of
commissioners may never be wanting. But to prevent
the delay of justice by the absence of any of them, there
is also issued of course a writ of *fi non omnes*, directing
that if all cannot be present, any two of them (a jus-
tice

tice or serjeant being one) may proceed to execute the commission.

The ancient statutes before mentioned, which forbid the issuing of oyers and terminers, except to the justices of one bench or the other, or to those in eyre, are restrained by Serjeant Hawkins' judicious interpretation to mean special commissions only, granted at the complaint of particular persons, which practice hath long been obsolete.

Construction of
stat. Edw. 1. of
oyer and ter-
miner.

1 Woodeson,
113.

The courts holden before our present itinerant justices, exercising either their civil or criminal jurisdiction, are of record. The records are made up in the superior courts at *Westminster*, and then go down to be tried in their proper county before these justices; after which they are returned back to the higher jurisdiction with the verdict of the jury, for the purpose of entering up judgment, and carrying that judgment into execution.

Courts of
Nisi Prius.

Courts of Re-
cord.

Judgment
given in courts
above.

APPENDIX (P).

Of the Jurisdiction of the King's Bench to proceed against a Peer by Bill.—Want of Jurisdiction must be pleaded in Abatement.

INSTEAD of inserting the case of *Lonsdale and Littledale* at length (which may be found, 2d vol. H. Blac. Rep. 267. 299.), I shall content myself with stating the heads of the arguments.

It was an action brought by bill in the King's Bench against defendant, who was a peer: he pleaded in bar to the action, and the verdict being for plaintiff; error was brought first in the Exchequer-chamber, and afterwards in the House of Lords. The error assigned was, that

that the proceedings ought to have been by original writ; and not by bill.

The questions proposed to the judges were : 1st, Whether the court of King's Bench has any jurisdiction to hold plea in a personal action against a peer of the realm, and lord of parliament, who is neither in the custody of the marshal, nor is an officer or minister of court, without the king's original writ issuing out of his Chancery to warrant such action ?

2d, If the court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the defendant by pleading to issue, and proceeding to trial in an action commenced without the king's original writ ?

The arguments used on the behalf of the plaintiff in error were: 1st, That the jurisdiction assumed by the court of King's Bench of proceeding against a peer, by *original bill*, is not warranted either by the common or statute law of this realm.

By the common law, that court has power to hold plea by bill against two descriptions of persons only, viz. against the attornies, officers, ministers, or clerks of the court, who are supposed to be present in court; (and the course always has been to exhibit original bills against them, as being present in court in their proper persons,) and against persons in custody of the marshal of the Marshalsea of the court; and in such bills it is necessary to allege, that the defendant is in the custody of the marshal of the Marshalsea of that court. This last-mentioned branch of its jurisdiction, in progress of time, has been extended to all persons against whom the process of *capias* could issue, by the following fiction, viz. the court, having an original jurisdiction in trespasses *vi & armis*, issues a writ called a bill of *Middlesex*, or *latitat*, commanding the sheriff to take the body of a defendant as for a supposed trespass *vi & armis*, which the defendant never has in reality committed; and the defendant being taken, and brought into the custody of the marshal of the court upon this writ, the plaintiff may exhibit a bill against him, *as in the custody of the marshal*, for any cause of action whatsoever; upon which fiction rests this branch of its jurisdiction at this day,

day. This writ, except in cases where an *ac etiam* for bail is inserted, is not executed upon the defendant's person, but he is served with a copy of it, and appears and files common bail; which is a proceeding by which a defendant, instead of being committed to the custody of the marshal, is supposed to be delivered on bail upon a *cepi corpus* to John Doe and Richard Roe, which is the same as a commitment to the custody of the marshal. *It is evident this mode of proceeding never could apply to a peer, because his person could never be arrested and brought into the custody of the marshal by a capias in trespass, as no such capias lies against a peer; and therefore Lilly, in his Entries, page 21, observes in a note, that a peer cannot be sued in the King's Bench by bill, by reason he is therein alleged to be in the custody of the marshal. The next and only other jurisdiction which the King's Bench has in civil actions is, by an authority delegated to the court, by an original writ issued from the court of Chancery, returnable in the King's Bench; and this applies to peers as well as other persons, with this difference as to the process by which the defendant is brought into court; that against all persons (except peers or privileged persons during the time of privilege) the process is *summons, attachment, and capias*; whereas against peers the process is *summons and distringas in infinitum* only, as no *capias* lies; the common law having given no jurisdiction to the King's Bench of proceeding against peers, except by such original writ.*

The next question is, Whether the statute of 12 and 13 W. 3. has given that court a jurisdiction of proceeding against them by original bill? But from the very words of that act, it is clear, that the form of proceeding against a peer is not thereby varied; and *that the original bill is not given against peers, but only against knights, citizens, or burghesses, or other persons entitled to privilege of parliament*; which words *other persons* can by no rule of construction be contended to apply to peers, but only to inferior degrees of persons, as officers, ministers, and clerks of the houses of parliament, &c.; and what is the most convincing proof that the peers did not mean to give a jurisdiction by original bill against them is, that the bill originally sent up to the lords by the commons had the words "peer of this realm or lord of parliament" inserted, and the lords struck out those words.

words. *Vide* Journals of the House of Commons, vol. 13th, 567.

If then the court of King's Bench has no jurisdiction, the defendant's consent cannot give it jurisdiction. Want of jurisdiction is matter of error, and in this case appears on the record; and therefore there is no occasion for a plea to disclose it. The proceeding by original bill inverts the whole course of proceedings against peers from the beginning to the end of the suit. The returns of writs in every stage of the suit are totally different, and not only so, but a new jurisdiction is created by proceeding by bill instead of original, as a writ of error in the former case is given to the Exchequer-chamber, whilst in the latter it can only be returnable in parliament.

On the part of the defendant in error, it was argued, that the court of King's Bench had jurisdiction to proceed against a peer by bill: that this appears by the statute 12 and 13 W. 3. c. 3. which authorizes against a peer such process, during the times there limited (which limitations are since removed, and extended to all times, by statute 10 Geo. 3. c. 50.), as might have been had against him out of the time of privilege. Before that statute, peers were by the practice of the court (and the practice of the court constitutes the law of the court) sued there out of the time of privilege by this form of proceeding, *viz.* by bill, summons, and distress; and may now therefore, by virtue of the above statutes, be so sued at any time. Much stress was also laid on the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, Cowp. 844. But that if it was an objection, it is merely an objection of form, and ought to have been pleaded in abatement; but was waived by defendant's making a full defence, and submitting to the jurisdiction.

In answer to the two queries above stated to have been put to the judges, Lord Chief Justice Eyre stated the unanimous opinion of the judges, that the first question would have admitted considerable doubt, if the objection had been made in an earlier stage of the cause; and that the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, were not to be considered as decisive authorities on the subject; but that after pleading in chief, it was too late for the defendant to object to the jurisdiction of the court.

APPENDIX (Q).

Of the Guardian and Prochein Ami.

AS infants are incapable, or at least presumed by law to be so, of acting for themselves, so they are not supposed to have sufficient discretion to choose a proper person as an attorney to act for them. At common law, therefore, as might naturally be expected, the guardian of the infant was the person to prosecute and defend suits in his behalf. But inasmuch as infants were subjected in a great measure to the control and power of their guardians, who, from selfish and rapacious motives, might and too often did make a prey of their substance, instead of protecting it, and who also themselves were the very persons who disturbed and injured the infants in their right, by which means, as they could not sue in person, nor appoint an attorney, it was difficult for them to obtain redress; the legislature at length interposed, and by statute *West. 1. c. 48.* enacted, *That if an infant be esloined or disturbed by his guardian or feoffee, or any other whereby he cannot prosecute his assize, any one of his nearest friends who pleases may sue for him.* And afterwards, by statute *West. 2. c. 15.* a general privilege is allowed in all cases for minors to sue by their next friend, who is to be admitted for that purpose. Since this statute of *West. 2.* the common rule seems to have been, that an infant shall sue by *prochein ami*, and defend by *guardian*. In the books, ^{2 Inst. 263} the names of *guardian* and *prochein ami* are oftentimes taken the one for the other, because it frequently happened that they used to be one and the same, as the *guardian in socage* was also *prochein ami*, &c. Afterwards, as well the *guardian* as the *prochein ami* were allowed by the judges to be some of the officers of the court, who, both in respect of their place and skill, were deemed the best *procheins amies* for the good and furtherance of the infant's cause.

But

But now any person, who, as friend to the infant, is willing to prosecute or defend for him, is admitted, upon proper petition and application to the court, as *guardian* or *prochein ami*.

APPENDIX (R).

Forms of Notices, &c. in Proceedings against Justices, &c.

The form of notice to the justice that an action will be commenced against him for issuing a distress warrant.

* Or whatever the offence may be, which must be here accurately stated.

" PURSUANT to an act of parliament, made and passed in the 24th year of the reign of his majesty King George the Second, intituled, *An Act for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants*: This is to give notice, That a latitat, (or as the process may be,) is intended to be sued out of his majesty's court of King's Bench, against you and one C. D. at the suit of A. B. in a plea of trespass; for that you and the said C. D. on the day of in the year of our Lord 1796, with force and arms*, broke and entered the dwelling-house of the said A. B. situate, standing, and being in the parish of in the county of and staid and continued in the said house for a long time, to wit, for the space of ten hours, and during that time greatly disturbed the said A. B. in the peaceable and quiet possession and occupation of his said house; and seized, took, and carried away the goods and chattels following: to wit, one mahogany table (*here set forth the goods*) of the said A. B. of the value of 20*l.* there then found in the said dwelling-house, and converted and disposed thereof to your own use, to the damage of the said A. B. of 50*l.* Dated this day of 1796.

To E. F. Esq. one of his Majesty's
Justices of the Peace for the
County of Middlesex.

" T. S. Attorney for
" the said A. B."

" Mr.

Notice to the constable to demand a copy of the warrant.

"T. S. Attorney for the
"said A. B."

Notice to be given to excise officer before action commenced.

"Your's," &c.

APPENDIX (S).

Forms of Writs, &c. in Ejection.

Writ of habere
facias posses-
sionem.

“ **G**EORGE the Third, &c.—To the sheriffs of *Surry*,
 “ greeting: Whereas A. B. lately in our court, before
 “ us at *Westminster*, by our writ (*if by original, if by*
 “ *bill, then by bill without our writ, and by the judgment*
 “ *of the same court*) recovered against C. D. late of
 “ *Westminster*, yeoman, his term yet unexpired of
 “ and in four messuages, &c. (the premises recovered),
 “ with the appurtenances, in the parish of *Wimbledon*
 “ in your county, and also of and in the rectory of
 “ *Wimbledon*, with the appurtenances, in your county;
 “ which one E. F. on the 6th day of June, in the 35th
 “ year of our reign, demised to the said C. for a term of
 “ years, which is not yet expired; that is to say, from
 “ the first day of the said month of June, to the full
 “ end and term of ten years then next following, and
 “ fully to be complete and ended; by virtue of which
 “ said demise, the said C. entered into the said rectory
 “ and tenements, with the appurtenances, and was
 “ thereof possessed until the said E. afterwards, that is
 “ to say, on the same 6th day of June, in the said 35th
 “ year of our reign, with force and arms, entered into
 “ the said rectory and tenements, with the appur-
 “ tenances, in and upon the possession of the said A.
 “ thereof, and ejected, drove out, and removed the
 “ said A. from his said farm, the said term then and
 “ yet being unexpired, and did and still doth withhold
 “ the possession of the same from the said A. whereof
 “ the said C. is convicted, as appears to us of record;
 “ and for as much as it is adjudged in our same court be-
 “ fore us, that the said A. have execution upon his said
 “ judgment against the said C. according to the force,
 “ form, and effect of the said recovery; therefore we
 “ command you, that without delay you cause the said
 “ A. to have possession of his said term, yet unexpired,
 “ of and in the said rectory and tenements, with the
 “ appurtenances; and in what manner you shall have
 “ executed

"executed this precept, do you make appear to us, in
 "three weeks from the day of *Saint Martin*, where-
 "ever we shall then be in *England*. Witness *Lloyd*
 "Lord *Kenyon* at *Westminster*, the day of
 "in the 36th year of our reign."

If you wish a *feri facias* to be added for the costs,
 before the word witness add—

"We likewise command you, that you cause to be
 "made 10*l.* 1*s.* 6*d.* of the goods and chattels of the
 "said C. in your bailiwick, which were awarded to the
 "said A. in our same court for his damages, which he
 "sustained by reason of the said trespass and ejectment;
 "and have you those monies before us, at the same
 "time, wherever we shall then be in *England*, to
 "render to the said A. for his damages aforesaid,
 "whereof the said C. is convicted, and have there this
 "writ."

Writ of pos-
 session with *fi.*
fa. for costs.

If a *ca. fa.* for the damages to be added, say before
 the word witness—

"We likewise command you, that you take the said
 "C. if he be found in your bailiwick, and safely keep
 "him, so that you have his body before us at *West-*
 "*minster* at the day aforesaid, to make satisfaction to
 "the said A. for 6*l.* 10*s.* for his damages, which he
 "has sustained, as well by reason of the trespass and
 "ejectment aforesaid, as for his expences laid out by
 "him about his suit in this cause, whereof the said C.
 "is convicted, as appears to us on record, and have
 "there this writ."

Writ of pos-
 session with *ca.*
fa.

Form of Affidavit under 4 Geo. 2.

"E. F. the lessor of the plaintiff in this cause, and
 "A. B. of, &c. gent. severally make oath and say,
 "and first this deponent E. F. for himself saith, that on
 "the day of last past, and for several
 "days before, the messuage in the annexed declaration
 "of ejectment mentioned was shut up, and there
 "being no tenant in possession thereof, he this deponent
 "did, on the day of last, affix a copy
 "of the said declaration in ejectment hereto annexed,
 "and the notice thereunder written, upon the door of
 "the

Form of affi-
 davit under
 4 Geo. 2.

APPENDIX (S).

" the said messuage, late in the tenure of the said C. D.
 " being the most notorious part of the said premises:
 " And this deponent A. B. for himself saith, that before
 " such declaration in ejectment was affixed as aforesaid,
 " there was due to him as landlord of the said premises,
 " from the said C. D. the tenant thereof, the sum of
 " 10*l.* for half a year's rent, upon and by virtue of a
 " certain indenture of lease, bearing date the day of
 " and made between this deponent of the
 " one part, and the said C. D. of the other part; and
 " that no sufficient distress was then to be found upon
 " the premises, countervailing the arrears of rent then
 " due to this deponent: And this deponent further
 " saith, that he had, at the time of affixing of the said
 " declaration in ejectment upon the door of the said
 " messuage, power to enter on the said premises therein
 " mentioned, by virtue of the said lease, for the non-
 " payment of the rent so in arrear as aforesaid."

APPENDIX (T).

*Forms of Writs, and Proceedings in Replevin.*Form of *Recordari Facias Loquelam.*

Form of refalo.

" **G**EOERGE the Third, by the grace of God, of
 " Great Britain, France, and Ireland king, de-
 " fender of the faith, &c.—To the sheriff of *Bucking-*
 " *hamshire*, greeting: We command you, that in your
 " full county you cause the plaint to be recorded, which
 " is in the same county, without our writ, between
 " C. D. and E. F. and G. H. of the cattle, goods, and
 " chattels of the said C. taken and unjustly detained,
 " as it is said; and that you have the said record before
 " us (or if in C. B. before our justices) at *Westminster*,
 " from *Easter* day, in fifteen days, under your seal and
 " the seals of four lawful knights of the same county,
 " of such as shall be present at the said record; and
 " that you prefix the same day to the parties, that then
 " they

"they may be there ready to proceed in the said plaint
 "as shall be just; and have you there the names of the
 "said four knights, and this writ. Witness ourselves
 "at *Westminster*, the day of in the
 "36th year of our reign."

Let this writ be executed if the said C. desires it,
 otherwise not.

The return thereof is as follows :

"By virtue of this writ to me directed, in my full Of return.
 "county held at *Aylesbury* the day of
 "in the 36th year of the reign of our sovereign lord
 "George the Third, king of *Great Britain, France,*
 "and *Ireland*, &c. I caused the plaint to be recorded,
 "which is in the same county, without the writ of our
 "said lord the king, between C. D. and E. F. and G. H.
 "of the cattle, goods, and chattels of the said C. taken
 "and unjustly detained, as it is said; which said plaint
 "appears in a certain schedule to this writ annexed;
 "and I have the said record before our said lord the
 "king (or the justices of our said lord the king) at *West-*
 "*minster*, on the day within written, under my seal and
 "the seals of four lawful knights of the same county,
 "who were present at the said record; and I have pre-
 "fixed the same day to the parties, that they may be
 "then and there ready to proceed in the said plaint, as
 "shall be just.

"The answer of A. B. Esq. sheriff."

The schedule to be annexed to the writ and return.

"At my full court held at *Aylesbury* in the county of Form of sche-
 "Bucks, the day of in the 36th year dule annexed to
 "of the reign of our sovereign lord George the Third, return.
 "&c. before L. M., N. O., P. Q., and R. S., four
 "lawful knights of the same county (amongst other
 "things,) it is thus contained: C. D. complains against
 "E. F. and G. H. of a plea of taking and unjustly de-
 "taining of his cattle, goods, and chattels, to wit, one
 "mare and four colts of the said C. and at my full
 "court held at *Aylesbury* in the county aforesaid, the
 "day of last, before S. T., J. M., N. U.,
 "and W. X., four lawful knights of the said county, I
 "caused

“ caused the said plaint between the parties aforesaid to
 “ be recorded as the writ hereunto annexed requires.
 “ In testimony whereof, as well I the said sheriff, as the
 “ said S. T., J. M., N. U., and W. X., who were present
 “ at the said record, have caused our seals to be here-
 “ unto put, the day and year and place above-mentioned.
 “ A. B. Esq. Sheriff.”

Form of Writ of *Pone*.

Form of pone.

“ George the Third, &c.—To the sheriff of *Bucks*,
 “ greeting: Put by sureties and safe pledges E. F. that
 “ he be before our justices at *Westminster*, from [*the re-*
 “ *turn-day*], to answer to C. D. of a plea, wherefore
 “ he took the castle, goods, and chattels of the said C.
 “ and them unjustly detained against gages and pledges,
 “ as he saith, and to shew wherefore he hath not ap-
 “ peared in our court before our justices at *Westminster*
 “ from [*the return of the refalo*] last past, as the day
 “ prefixed to him; and have you there the names of
 “ the pledges, and this writ. Witness Sir *James Eyre*,
 “ knight, at *Westminster*, the day of
 “ in the 36th year of our reign.”

Form of *Procedendo*.Form of pro-
cedendo.

“ George the Third, &c.—To the sheriff of *Bucks*,
 “ greeting: Although we lately commanded you, that
 “ in your full court you caused the plaint to be recorded,
 “ which is in the same county, without our writ, be-
 “ tween C. D. and E. F. of the cattle, goods, and chat-
 “ tels of the said C. taken and unjustly detained, as it
 “ was said; and that you should have the said record be-
 “ fore our justices at *Westminster*, from [*the return of the*
 “ *refalo*], under your seal, and the seals of four lawful
 “ knights of the same county, of such as should be
 “ present at the said record, and that you prefixed the
 “ same day to the parties, that then they might be there
 “ ready to proceed in the said plaint, as should be just;
 “ and that you should have there the names of the said
 “ four knights, and that writ: Yet we, being now
 “ moved with certain causes in our court, before our
 “ said justices, command you, that in the same plaint,
 “ against the said E. F. at the suit of the said C. D.
 “ before you levied or affirmed, and now depending un-
 “ determined, you proceed at your next county-court
 “ to be holden in and for the same county, with what
 “ speed

"speed you can, in such manner, according to the law
 "and custom of *England*, as you shall see proper; our
 "said writ in that behalf heretofore directed to the
 "contrary in any wise notwithstanding. Witness, &c.
 "on, &c. at, &c. in the 36th year of our reign."

The Form of the Writ *Pro Retorno Habendo* :

"George the Third, by the grace of God, &c.—To the sheriff of *Bucks*, greeting: Whereas E. F. was summoned to appear in our court before us (or before our justices) at *Westminster*, to answer C. D. in a plea, wherefore he took the cattle of the said C. to wit, one mare and four colts, and unjustly detained the same against sureties and pledges, as he says; and the same C. afterwards in our said court made default, whereupon it was then and there considered, that the said C. and his pledges of prosecuting should be in mercy, and that the aforesaid E. should go thereupon without delay, and that he should have a return of the cattle aforesaid. Therefore we command you, that you cause to be returned the cattle aforesaid to the said E. without delay; and the same at the complaint of the aforesaid C. you do not deliver without our writ, which shall make express mention of the aforesaid judgment; and in what manner you shall execute this our precept, you shall make manifest to us (or to our justices) at *Westminster*, on [*a general return-day, all the proceedings being by original*]; and have you there this writ. Witness, &c. on, &c. in the 36th year of our reign."

Form of writ
 pro retorno ha-
 bendo.

The Writ of second Deliverance is to the following Effect:

"George the Third, &c.—To the sheriff of *Bucks*, greeting: We command you, if C. D. shall make you secure of prosecuting his complaint, and also of returning the cattle which to E. F. lately in our court, before our justices at *Westminster*, at a certain day now past, were adjudged by the default of him the said C. D. if a return thereof shall be adjudged, then the cattle to him the said C. D. without delay, you cause to be delivered, and put by sureties and safe pledges the aforesaid E. F. that he be before our justices at *Westminster* [*the return*], to answer the said C. D. of the taking of the cattle aforesaid, and that you have there the names of the pledges, &c. and

Writ of second
 deliverance.

"this writ. Witness Sir James Eyre, knight, at *West-*
 "minster, the day of in the 36th year
 "of our reign."

Form of Writ of *Witbernham*.

Writ of with-
 nam.

"George the Third, &c.—To the sheriff of *Bucks*,
 "greeting: Whereas E. F. was summoned to appear
 "in our court, before our justices at *Westminster*, to
 "answer C. D. of a plea, wherefore he took the cattle
 "of the said C. and unjustly detained the same against
 "sureties and pledges, as he says; and the same C.
 "afterwards, in our same court, made default in the
 "same plea; whereupon it was then and there con-
 "sidered, that the same C. and his pledges of profe-
 "cution should be in mercy; and that the said E.
 "should go thereupon without delay, and that he should
 "have a return of the cattle aforesaid: whereupon, by
 "our writ, we commanded you, that you caused to be
 "returned the cattle aforesaid to the said E. without
 "day, and the same at the complaint of the said C. you
 "should not deliver without our writ, which of the
 "aforesaid judgment should make express mention, and
 "in what manner you should have executed our said
 "precept: you should make manifest to our justices at
 "*Westminster*, on [the return-day of the return habendo]
 "last past; on which day you returned to our said justices
 "at *Westminster*, that before the coming of the aforesaid
 "writ, the cattle aforesaid were elained or conveyed
 "away to places unknown to you by the said C. so that
 "the cattle aforesaid to the said E. you could not cause
 "to be returned, as by the said writ you was commanded:
 "Therefore we command you, that of the cattle of
 "him the said C. to the value of the cattle before taken
 "in *withernam*, you take and deliver to him the said E.
 "to be held by him, until the said cattle, before taken,
 "you can cause to be returned; and put by sure and safe
 "pledges the aforesaid C. that he be before our justices at
 "*Westminster*, on [the return day], to answer as well to
 "us: of the contempt, as to the said E. of the damages
 "and injuries to him in that behalf done; and in what
 "manner this our precept you shall execute make
 "appear to our justices at *Westminster*, at the aforesaid
 "return; and that you have there the names of the
 "pledges, with this writ. Witness, &c. on, &c. at, &c.
 "in the thirty-sixth year of our reign."

Form

Form of Entry of a Suggestion in the Nature of a Cognizance.

“ *Bucks*, to wit.—E. F. was summoned to answer Form of suggestion in nature of cognizance.
 “ C. D. in a plea, wherefore he took the cattle, goods,
 “ and chattels of the said C. and unjustly detained
 “ the same against gages and pledges, &c. and where-
 “ upon the said E. offered himself in court here, in his
 “ own proper person, on the day of against
 “ the said C. in the plea aforesaid, and the said C.
 “ came not, but made default: Therefore it is
 “ considered, that the said C. and his pledges for
 “ prosecuting be in mercy, and that the said E. go
 “ thereof without day, and have a return of the said
 “ cattle, goods, and chattels, &c. and thereupon the
 “ said E. says, that he the said E. took the said cattle,
 “ goods, and chattels, of the said C. for the taking
 “ whereof he was summoned to appear in the said
 “ court of our said lord the king of the bench at *West-*
 “ *minster*, to answer to the said C. as aforesaid, at the
 “ parish of O. in the said county, in a certain place
 “ there called the stable; and that he took the same as
 “ bailiff of I. A. for that the said C. at the time of the
 “ taking the said cattle, goods, and chattels, and for
 “ the space of two years and three quarters of a year
 “ ended at and upon the day of and from
 “ thence until the time of the taking of the said cattle,
 “ goods, and chattels, held and enjoyed the said stable,
 “ with the appurtenances, amongst other things, as
 “ tenant thereof to the said I. A. at and under the
 “ yearly rent of twelve pounds, payable quarterly; and
 “ because the sum of thirty-three pounds, of the yearly
 “ rent aforesaid, for two years and three quarters of an-
 “ other year, ending at and upon the said day of
 “ in the said year of our Lord 1796, on that day
 “ in that year, and at the time of taking the said cattle,
 “ goods, and chattels, were in arrear and unpaid, he
 “ the said E. as bailiff of the said I. took the said cattle,
 “ goods, and chattels, for and in the name of a distress
 “ for the said rent so due in arrear and owing from the
 “ said C. to the said I. as aforesaid. And the said E.
 “ according to the form of the statute in such case made
 “ and provided, prays a writ of our lord the king to be
 “ directed to the sheriff of *Bucks*, to enquire of the
 “ sum in arrear of the rent aforesaid, and of the value
 “ of the cattle, goods, and chattels aforesaid; and it is
 “ granted

“granted to him : wherefore the sheriff is commanded,
“that, by the oath of twelve good and lawful men of
“his bailiwick, he diligently enquire how much rent
“was in arrear and due to the said I. at time of the
“taking of the cattle, goods, and chattels aforesaid,
“and how much the said cattle, goods, and chattels, so
“taken in the name of a distress as aforesaid, were
“worth, according to the true value thereof; and the
“inquisition which he shall thereupon take, let him
“make appear here on [the return day], under his seal
“and the seals of those by whose oath he shall take the
“said inquisition,” &c.

Upon entering the above suggestion on a roll, the defendant may then sue out his writ of enquiry, which is to the following effect :

Writ of en-
quiry.

"George the Third, by the grace of God, &c.—To
"the sheriff of *Bucks*, greeting: Whereas E. F. was
"lately summoned to appear in our court of the bench,
"before our justices at *Westminster*, to answer unto C. D.
"of a plea, wherefore he took the cattle, goods, and
"chattels of the said C. and unjustly detained the same
"against gages and pledges, until, &c. and the said
"E. F. offered himself in court, before our justices at
"Westminster, in his own proper person, on the
"day of against the said C. in the plea aforesaid:
"and the said C. came not, but made default: There-
"fore it was considered that the said E. and his pledges
"should be in mercy; and that the said E. should go
"thereof without day, and have a return of the said
"cattle, goods, and chattels. And thereupon it hath
"been suggested to us in our said court, before our said
"justices at *Westminster* aforesaid, by the said E. that
"he the said E. took the said cattle, goods, and chattels
"of the said C. for the taking whereof he was summoned
"to appear in our said court of the bench, before our
"said justices at *Westminster*, to answer the said C. D. as
"aforesaid, at the parish of O. in the said county, in
"a certain place there called the stable, and that he
"took the same as bailiff of J. A.; for that the said C.
"for the space of two years and three quarters of
"another year, ending at and upon the said day
"of in the year of our Lord 1796, and from
"thence until and at the time of taking of the said
"cattle, goods, and chattels, held and enjoyed the said
"stable.

" stable, with the appurtenances, amongst other things,
 " as tenant thereof to the said J. at and under the yearly
 " rent of twelve pounds, payable quarterly: and be-
 " cause the sum of thirty-three pounds of the yearly
 " rent aforesaid, for two years and three quarters of
 " another year, ending at and upon the said day
 " of in the year of our Lord 1796, on that day
 " in that year, and at the time of taking the said cattle,
 " goods, and chattels, were in arrear, and unpaid to the
 " said J. he the said E. as bailiff of the said J. took the
 " said cattle, goods, and chattels, for and in the name
 " of a distress for the said rent so due in arrear and
 " owing from the said C. to the J. as aforesaid. And
 " the said E. according to the form of the statute in
 " such case made and provided, prayed our writ to be
 " directed to you, to enquire of the sum in arrear of
 " the rent aforesaid, and of the value of the cattle,
 " goods, and chattels aforesaid: Therefore we com-
 " mand you, that according to the form of the statute
 " in that case made and provided, you diligently en-
 " quire, by the oath of twelve good and lawful men of
 " your county, how much of the yearly rent aforesaid,
 " at the time of taking the said cattle, goods, and
 " chattels, were in arrear and unpaid; and how much
 " the said cattle, goods, and chattels, taken as aforesaid,
 " were worth, according to the true value of the same.
 " And the inquisition which you shall thereupon make
 " you shall certify to our justices at *Westminster* on [the
 " return] under your seal, and the seals of those by
 " whose oath you shall take that inquisition; and have
 " you there the names of those by whose oath you shall
 " take that inquisition, and this writ. Witness Sir
 " *James Eyre*, knight, at *Westminster*, the day
 " of in the thirty-sixth year of our reign."

APPENDIX (U).

Forms of Writs of Habeas Corpus.

Habeas corpus
ad responden-
dum to remove
a person from
the Fleet to
K. B.

“GEORGE the Third, &c.—To the warden of our
“prison of the Fleet, greeting: We command you
“that the body of A. B. Esq. in our prison under
“your custody, as it is said, detained under a safe and
“secure conduct, together with the day and cause of
“his caption and detention, by whatsoever name the
“same A. B. may be called in the same, you have be-
“fore us at *Westminster*, on _____ day next after
“_____ to answer to C. D. in a plea of trespass,
“and also to a bill of him the said C. D. against the
“said A. B. for 50*l.* upon promises according to the
“custom of our court, before us to be exhibited, and to
“do and receive all and every thing which our same
“court before us shall then and there consider con-
“cerning him in this behalf; and have there then this
“writ. Witness *Lloyd Lord Kenyon*, at,” &c.

Habeas corpus
ad testifican-
dum.

“George the Third, &c.—To W. J. Esq. being
“marshal of our Marshalsea before us, greeting: We
“command you that the body of D. D. in our prison,
“under your custody, as it is said, detained under a safe
“and secure conduct, by whatsoever name the said D.
“may be called in the same, you have before our trusty
“and well beloved *Lloyd Lord Kenyon*, our chief justice
“assigned to hold pleas in our court, before us at *West-*
“*minster*, in his great hall of pleas there, on Thursday
“the _____ day of this month of _____ at eight
“o’clock in the forenoon of the same day there, to
“testify the truth of his knowledge in a certain cause,
“in our court before us now depending, and then and
“there to be tried between A. B. plaintiff and C. D.
“defendant, in a plea of trespass on the case, and then
“immediately after the said D. D. shall then and there
“have given his testimony before the said chief justice,
“to return him the said D. D. to our same prison,
“under safe and secure conduct; and have there then
“this

"this writ. Witness *Lloyd Lord Kenyon*, at *Westminster*, the day of in the thirty-sixth year of our reign."

"George the Third.—To the warden of our prison of the Fleet, greeting: We command you that you have before us at *Westminster*, on next after the body of G. H. under safe and secure conduct detained in our prison, under your custody, as we are informed, together with the day and cause of his being taken and detained, by whatsoever name the said G. H. is there known, to satisfy T. S. 30 l. which the said T. S. lately in our court before us at *Westminster* recovered against the said G. H. for his damage which he sustained, as well by reason of the not performing certain promises and undertakings lately made by the said G. to the said T. at *Westminster* in the county of *Middlesex*, as for his costs and charges by him laid out about his suit in that behalf, whereof the said G. is convicted, as appears to us of record, and further to do and receive what our said court before us shall then and there consider of him in this behalf; and have there then this writ. Witness *Lloyd Lord Kenyon*," &c.

Habeas corpus
ad satisfaci-
endum in case.

"George the Third, &c.—To the [*describe the Sheriff, judge, or steward of the court to which it is directed properly*] greeting: We command you that you have the body of W. W. detained in your prison under your custody, as it is said, by whatsoever name he may be called in the same, together with the day and the cause of the taking and detaining the said W. W. before our right trusty and well beloved *Lloyd Lord Kenyon*, our chief justice assigned to hold pleas in our court before us (or if in C. B. before Sir *James Eyre*, knight, our chief justice of the bench) at his chambers, situate in Serjeants Inn in Chancery-lane, (or if it be returnable in term, make it returnable at a day certain,) immediately after the receipt of this our writ, to do and receive all and singular those things which our said chief justice shall then and there consider of him in this behalf; and have there then this writ. Witness *Lloyd Lord Kenyon*," &c.

Habeas corpus
ad faciendum
et recipiendum.

APPENDIX (W).

Forms of Writs and Proceedings in Error.

Entry of a writ
of error on a
judgment in
C. B.

“ **G**EORGE the Third, &c.—To his trusty and well-beloved Sir *James Eyre*, Chief Justice of the Bench, greeting: For as much as in the record and process, and also in giving of judgment in a plaint which was in our court before you, and your companions, our Justices of the Bench, by our writ between John Doe and Richard Roe, in a plea of trespass on the case, as it is said, manifest error hath intervened to the great damage of the said Richard Roe, as by his complaint we are informed; we being willing that the said error, if any there be, should be duly amended, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given thereupon, then you send to us distinctly and plainly under your seal, the record and process of the said plaint, with all things touching the same and this writ; so that we may have them on the morrow of the Holy Trinity, wheresoever we shall then be in *England*, that inspecting the record and process aforesaid, we may cause further to be done thereupon for amending the said error as of right, and according to the law and custom of *England*, shall be meet to be done. Witness ourself at *Westminster*, the 8th day of May, in the 36th year of our reign.”

The answer of Sir *James Eyre* to the foregoing writ.

Return to writ. “ The record and process whereof mention is within made, follow in these words, to wit:

Transcript.

“ Pleas at *Westminster*, before Sir *James Eyre*, knight, and his brethren, Justices of the Bench of the Lord the King, at *Westminster*, of the term of *Easter*, in the 36th year of the reign of our Sovereign Lord
“ *George*

"George the Third, by the Grace of God of Great Britain, France, and Ireland King, Defender of the Faith, &c. and in the year of our Lord 1796.— Roll 295. *Middlesex*, to wit: Richard Roe, late of *Westminster* in said county of *Middlesex*, gentleman, was attached to answer John Doe in a plea of trespass on the case, &c. And thereupon," &c. (Here follows *verbatim* the declaration.) "And the said Richard, by T. S. his attorney, comes and defends the force and injury when," &c. (Here follows the pleadings *verbatim*, as the case may be): Or if judgment by default, the whole is set out, with the award of inquiry and inquisition, together with the final judgment of the court, down to "And the said Richard, in mercy," &c. precisely in the same way as the record is made up and completed, in order to be docketted.

"George the Third, &c.—To the sheriff of *Middlesex*, greeting: Whereas John Doe, lately in our court, before Sir James Eyre, knight, and his companions, our Justices of the Bench at *Westminster*, by our writ, and by the judgment of the same court, recovered against Richard Roe, late of *Westminster* in your county, yeoman, 30*l.* for his damages, which he had sustained as well by occasion of the said Richard Roe not having performed certain promises and undertakings lately made by him to the said John Doe, as for his costs and charges by him about his suit in that behalf expended, whereof the said Richard Roe is convicted, as by the record and proceedings thereof, which we lately caused to be brought into our court before us, for certain causes of error, manifestly appear. And now, on behalf of the said John Doe, we have received information, that although the said judgment be given in form aforesaid, yet execution of the said damages still remains to be made to him; wherefore the said John Doe hath intreated us to provide him a proper remedy in this behalf; and we, being willing that what is just should be done on this occasion, command you, that by honest and lawful men of your bailiwick, you make it known to the said Richard Roe, that he be before us on

Scire facias
quare executionem non;

or as the case
may be.

"where-

“ wheresoever we shall then be in *England*, to shew if
 “ he has or knows of any thing to say for himself, why
 “ the said John Doe ought not to have execution
 “ against him of the damages aforesaid, according to
 “ the force, form, and effect of the said recovery, if it
 “ shall seem expedient to him so to do, and further to
 “ do and receive what our said court before us shall
 “ consider of him in this behalf; and have you there
 “ the names of those by whom you shall make it known
 “ to him, and this writ. Witness *Lloyd Lord Kenyon*
 “ at *Westminster*, the day of in the 36th
 “ year of our reign.

“ Mansfield and Way.”

The entry of a *non pros* after *scire facias quare executionem non*, now in error for want of assigning errors:

Non pros after
 scire facias
 quare execu-
 tionem.

“ Afterwards, to wit, on Monday next after eight
 “ days of St. Martin, in this same term, before our
 “ Lord the King at *Westminster*, comes the said John
 “ Doe, by his attorney aforesaid, and says, that execu-
 “ tion of the judgment aforesaid still remains to be
 “ made unto him; therefore he prays the writ of the
 “ Lord the King to be directed to the sheriff of the
 “ county of *Middlesex* aforesaid, that he make known to
 “ the said Richard, to be before the said Lord the King,
 “ wheresoever, &c. to shew if any thing he has or
 “ knows to say for himself, why the said John ought
 “ not to have execution of his damages, costs, and
 “ charges aforesaid, according to the form and effect of
 “ the judgment aforesaid; and it is granted to him, &c.
 “ by which it is commanded to the sheriff aforesaid,
 “ that by good and lawful men of his bailiwick, he
 “ make known to the said Richard, that he be before
 “ the Lord the King [*the return of the scire facias*
 “ *quare, &c.*] wheresoever, &c. to shew in form aforesaid,
 “ if, &c. and further, &c. the same day is given to
 “ the said John; at which day the said John, by his
 “ attorney aforesaid, comes before our Lord the King
 “ at *Westminster*, and offers himself against the said
 “ Richard in the plea aforesaid; and the said sheriff,
 “ to wit, Esq. and Esq.
 “ sheriff of the said county of *Middlesex*, returns that
 “ by virtue of the said writ to him directed by

“ and

"and good, &c. he has given notice to
 "the said Richard to appear, &c. to shew cause, &c.
 "as by that writ he was required; and the said Richard,
 "being solemnly called, doth not come, but makes de-
 "fault; and hereupon the said John says, that the said
 "Richard hath assigned no error or errors in the re-
 "cord and proceedings aforesaid, or in the giving the
 "judgment aforesaid; therefore a day is given to the
 "parties aforesaid, to come before our lord the king,
 "on Monday on the morrow of St. Martin, wherefo-
 "ever, &c.; that is to say, for the said Richard to as-
 "sign error or errors in the record and proceedings
 "aforesaid, or in the giving the judgment aforesaid;
 "at which day, before our lord the king at *West-*
 "*minster*, comes the said John by his attorney afo-
 "said; and the said Richard, being solemnly called,
 "doth not come, but again makes default; nor has he
 "farther prosecuted the said writ of error against the
 "said John; therefore it is considered, that the said
 "John do recover against the said Richard, as well his
 "damages aforesaid, as also 7*l.* adjudged to him by the
 "court of our lord the king now here, according to
 "the form of the statute in such case made and pro-
 "vided, for his damages, costs, and charges, which he
 "has sustained by occasion of the delay of execution of
 "the judgment aforesaid, by means of the prosecution
 "of the said writ of error, which damages in the
 "whole, amount unto £. ; and that the said John
 "have execution thereof, &c.; and the said Richard,
 "in mercy," &c.

The assignment of errors, that there is no original writ filed of record.

"In the King's Bench.

"Michaelmas Term in the 36th year of the reign of
 "King George the Third.

"Doe } Afterwards, (that is to say,) on Monday on
 "against } the morrow of Saint Martin, in this same
 "Roe. } term, before our lord the king at *Westmin-*
 "*ster* comes the said Richard, by his attorney,
 "and says, that in the record and proceedings aforesaid,
 "and also in the giving of the judgment aforesaid,
 "there is manifest error in this, (to wit,) that the decla-
 "ration

Diminution
alleged.

“ration aforesaid, and the matters therein contained,
“are not sufficient in law for the said John to have and
“maintain his aforesaid action thereof against the said
“Richard. There is also error in this to wit, that by
“the record aforesaid, it appears, that the said Richard
“was attached to answer the said John in the plea
“aforesaid; yet no original writ between the parties
“aforesaid, in the plea aforesaid, is filed of record in
“the said court of the said lord the king of the Bench
“at *Westminster* aforesaid; therefore in that there is
“manifest error. There is also error in this, that it
“appears by the record aforesaid, that the judgment
“aforesaid, in form aforesaid given, was given for the
“said John against the said Richard; whereas by the
“law of the land, the said judgment ought to have been
“given for the said Richard against the said John. And
“the said Richard prays a writ of the lord the king to
“be directed to the *custos breviarum* of the said court of
“the Bench at *Westminster*, to certify to the said lord
“the king the truth of the same: and it is granted to
“him, &c. And the said John prays, that the judg-
“ment aforesaid, for the errors aforesaid, and other
“errors in the record and proceedings aforesaid may be
“reversed, annulled, and altogether held for nothing;
“and that he may be restored to all things which he
“hath lost by occasion of the said judgment, &c.”
“A. Chambre.”

The *Certiorari* to certify the Original Writ.

Certiorari.

“George the Third, &c.—To our right, trusty, and well-
“beloved A. B., C. D., E. F. and G. H., Esqrs. holding
“the office of keeper of the writs, rolls, and records of
“our court of the Bench, greeting: We being willing,
“for certain causes to be certified, whether any original
“writ between John Doe and Richard Roe, late of
“*Westminster* in the county of *Middlesex*, yeoman, in a
“plea of trespass on the case, be filed in your custody or
“not, do command you, that you search our original
“writs directed to the sheriff of *Middlesex*, and which
“are filed of record in your custody of Easter Term, in
“the 35th year of our reign; and what you shall find
“therein of an original writ between the parties aforesaid,
“said, of the plea aforesaid, you certify to us without
“delay,

"delay, wheresoever we shall then be in *England*, together with the return and indorsement thereof, as fully as the same remains in your custody, and this writ. Witness *Lloyd Lord Kenyon*, at *Westminster*, the day of , in the 36th year of our reign.

"Mansfield and Way."

"The Answer of A. B., C. D., E. F., and G. H., Esqrs. holding the Office of Keeper of the Writs, Rolls, and Records within named.

"By virtue of this writ to us directed, we do hereby *Return*. certify to the lord the king within named, that we have searched the original writs directed to the sheriff of *Middlesex*, that are in our custody, filed of record of Easter Term in the 35th year of the reign of the said king; and that there is an original writ between the parties within named in a plea of trespass on the case directed to the sheriff of *Middlesex* in our custody, filed of record of the term aforesaid; the tenor of which said original writ, with the return and indorsement thereof, as fully as the same remains in our custody filed of record, we do hereby certify to the said lord the king, as appears by the schedule hereunto annexed, as we are within commanded."

(Here follows a copy (*fac simile*) of the original writ which was made out by the cursitor, and the indorsement thereon made by the sheriff, as filed with the *custos breviarum*.)

The Joinder in Error.

"Michaelmas Term in the 36th year of the reign of King George the Third.

"Mansfield and Way.

"Doe } Which said writ of *certiorari*, so prayed and
"and } granted, follows in these words, to wit:
"Roe. } George the Third, &c. [*proceed verbatim with the writ of certiorari to the end*, Mansfield and Way], which said keeper of the writs, rolls, and records returned and certified unto our said lord the king, that by virtue of the said writ of *certiorari*, they had searched the original writs directed to the sheriff of *Middlesex*

“ in their custody, filed of record of Easter Term in
 “ in the 35th year of the reign of our said lord the
 “ king; and that there was an original writ between
 “ the parties in the said writ of *certiorari*, named in a
 “ plea of trespass on the case, directed to the sheriff of
 “ *Middlesex*, in their custody, filed of record of the
 “ term aforesaid; the tenor of which said original writ,
 “ together with the return and indorsement thereof,
 “ as fully as the same remained in their custody, filed
 “ of record, they the said keeper of the writs, rolls, and
 “ records aforesaid, thereby certified to the said lord
 “ the king, as appeared by the schedule thereunto an-
 “ nexed, as the said keeper was in the said writ of
 “ *certiorari* commanded. And which said schedule, so
 “ annexed to the said writ of *certiorari*, follows in these
 “ words, to wit: *George the Third, &c.*—To the sheriff
 “ of *Middlesex*, greeting: If John Doe shall give you
 “ security to prosecute his suit, then put under sureties
 “ and safe pledges, Richard Roe, late of *Westminster*
 “ in your county, yeoman, that he be before our justices
 “ at *Westminster*, in fifteen days from the day of Easter,
 “ to shew; for that whereas [*to the end of original*
 “ *writ, then add sheriff's indorsement, viz.* Pledges to
 “ prosecute, J. D. and R. R. The within named John
 “ Gregory hath not any thing in my bailiwick whereby
 “ he can be attached. The answer of
 “ Esq. and Esq. Sheriff,
 “ attorney.] Which said writ of *certiorari*, together
 “ with the return of the same, among the records with-
 “ out day of Easter term aforesaid, is filed. And here-
 “ upon afterwards, to wit, Saturday next after eight
 “ days of St. Martin, in Michaelmas Term in the 36th
 “ year of the reign of the said lord the king, the said
 “ John Doe, by his attorney, freely
 “ comes here into court, and says, there is no error
 “ either in the record and proceedings aforesaid, or in
 “ giving the judgment aforesaid; and he prays, that the
 “ court of the said lord the king now here may proceed
 “ to examine as well the record and proceedings afore-
 “ said, as the matters aforesaid for errors assigned; and
 “ that the judgment aforesaid, in form aforesaid given,
 “ may be in all things affirmed. But because the court
 “ of the said lord the king now here is not yet ad-
 “ vised what judgment to give of and upon the pre-
 “ mises, a day is given therefore to the parties aforesaid

"to come before the said lord the king on
"wherefoever the said lord the king shall then be in
"England, to hear the judgment aforesaid; for that
"the court of the said lord the king now here is not
"yet advised thereof," &c.

"In Chancery.

"Between { *John Doe*, Plaintiff,
 and
 Richard Roe, Defendant.

"To the Right Honourable the Master of the Rolls:

"The Humble Petition of the Plaintiff

"Sheweth,

"That your petitioner having commenced an action
"at law in his Majesty's court of Common Pleas at
"Westminster, against the abovenamed defendant, in a
"plea of trespass upon the case, in which the venue is
"laid in *Middlesex*; your petitioner in Easter Term
"last obtained final judgment in the said action for
"28 l. 10 s. whereupon the said defendant brought a
"writ of error returnable on the morrow of the Holy
"Trinity, but no further proceedings have been had.

"That inasmuch as it is necessary that an original writ
"should be out of his Majesty's high court of Chancery
"to warrant the said proceedings, and the time for ap-
"plying for the same in the ordinary course being ex-
"pired, the curfitor of *Middlesex* has not now authority
"to issue the said writ without your Honor's order for
"that purpose.

"20th May 1796.

"Be it so, and let
"the petitioner pay
"the defendant his
"costs in error, in
"case the defend-
"ant does not, after
"having had notice
"of this order, fur-
"ther prosecute his
"said writ of error,
"and hereof give
"notice forthwith.
"Thomas Sewell."

"Your petitioner therefore hum-
"bly prays your Honor to grant an
"order for the curfitor of *Middlesex*
"to issue an original writ in the above
"cause, out of his Majesty's high
"court of Chancery, returnable in his
"Majesty's court of C. P. in fifteen
"days from the day of Easter last
"past.

"And your petitioner shall ever
"pray," &c.

Form of Writ *ad audiendum Errores*.Writ *ad audiendum errores*.

“ George the Third, &c.—To the sheriff of
 “ greeting: Forasmuch as in the record and proceedings,
 “ and also in the giving of the judgment in a certain
 “ plaint lately levied in our court of before the
 “ judges of the same court between A. B. and C. D. of a
 “ plea of trespass on the case, manifest error, as it is said,
 “ hath intervened to the great damage of the said C. as
 “ by his complaint we are informed; which said re-
 “ cord, and proceedings therein, we have, for certain
 “ reasons, caused to come in our court before us; and
 “ we, being willing, if any error there be, to correct
 “ the same, and to do unto the parties aforesaid full
 “ and speedy justice in this behalf, do command you,
 “ that, by good and lawful men of your bailiwick, you
 “ make known to the said A. that he be before us in
 “ wheresoever we shall then be in *England*,
 “ to hear the proceedings aforesaid, if it shall seem
 “ expedient unto him; and further, to do and receive
 “ what in our said court before us shall be considered
 “ of him in this behalf, and have there the names of
 “ them by whom you shall make known unto the said
 “ A. as aforesaid; and this writ. Witness,” &c.

Form of Affirmance to be entered on the Roll after
the Argument.Form of affir-
mance of judg-
ment in B. R.

“ At which day, before our lord the king at *West-*
 “ *minster*, come the parties aforesaid, by their attornies
 “ aforesaid, whereupon as well the record and proceed-
 “ ings aforesaid, and the judgment given in form aforesaid,
 “ as the matters aforesaid, by the said Richard
 “ above for error assigned, being seen and fully under-
 “ stood by the court of the said lord the king now here,
 “ and mature deliberation had thereupon; for that it
 “ appears to the court of our said lord the king now
 “ here, that there is no error either in the record
 “ and proceedings aforesaid, or in giving the judgment
 “ aforesaid; therefore it is considered that the judg-
 “ ment aforesaid, given in form aforesaid, be in all
 “ things affirmed; and it is further considered that the
 “ said John do recover against the said Richard, as well
 “ his damages aforesaid, as also 14^l. adjudged to him
 “ by the court of our lord the king now here, accord-
 “ ing

ing to the form of the statute in such case made and
 " provided, for his damages, costs, and charges which
 " he has sustained by occasion of the delay of execution
 " of the judgment aforesaid, by means of the prosecution
 " of the said writ of error, which said damages,
 " costs, and charges in the whole amount unto 42*l.* 10*s.*
 " and that he have execution thereof, &c.; and the
 " said Richard, in mercy," &c.

*Writ of Fi. Fa. and Ca. Sa. after Affirmance by K. B. of
 Judgment in C. B.*

Fi. Fa.

" *George* the Third, &c.
 " —To the sheriff of *M.*
 " greeting: We command
 " you, that you cause to be
 " made and levied of the
 " goods and chattels in
 " your bailiwick of Richard
 " Roe, late of *Westminster*
 " in your county, yeoman,
 " 28*l.* 10*s.* which John
 " Doe, lately in our court,
 " before and
 " his brethren, (then) our
 " justices of the bench at
 " *Westminster*, recovered
 " against the said Richard,"

Ca. Sa.

" *George* the Third, &c.
 " —To the sheriff of *M.*
 " greeting: We command
 " you, that you take Rich-
 " ard Roe, late of *West-*
 " *minster* in your county,
 " yeoman, if he shall be
 " found in your bailiwick,
 " and him safely keep, so
 " that you may have his
 " body before us in eight
 " days of Saint Hilary,
 " wheresoever we shall then
 " be in *England*, to make
 " satisfaction to John Doe
 " for 28*l.* 10*s.* which the
 " said John, lately in our
 " court, before
 " and his companions,
 " (then) our justices of the
 " bench at *Westminster*, re-
 " covered against the said
 " Richard,"

Form of writ of
 fi. fa. and ca. fa.
 after affirmance
 in K. B.

" for his damages which he sustained, as well by
 " reason of the said Richard's not having performed
 " certain promises and undertakings made by him to
 " the said John, as for his costs and charges which he
 " had been put unto about his suit in that behalf,
 " whereof the said Richard was convicted, as by the
 " record and proceedings thereof, which we lately
 " caused to come into our court before us for certain
 " causes of error, and now there remaining, it appears

" to us of record ; and also 14*l.* adjudged to the said
 " John in our said court before us, according to the form
 " of the statute in such case made and provided, for his
 " damages, costs, and charges which he hath sustained
 " and expended by occasion of the delay of the execu-
 " tion of the judgment aforesaid, by the prosecution of
 " our said writ of error, the said judgment being in our
 " said court before us in all things affirmed, whereof
 " the said Richard is also convicted, as appears to us
 " likewise of record :

" And have you the said " And have you there this
 " monies before us in eight " writ. Witness *Lloyd*
 " days of Saint Hilary, " Lord *Kenyon*, at *West-*
 " wheresoever we shall then " *minster*, the 28th day of
 " be in *England*, to render " November in the 36th
 " to the said John for his " year of our reign.
 " damages, costs, and " Mansfield and Way."
 " charges aforesaid, and
 " also this writ. Witness,"
 &c.

Writs of Execution on Non Pros after Sci. Fa. quare
Executionem non.

Fi. Fa.

Form of *fi. fa.*
 and *ca. fa.* after
non pros, or *sci.*
fa. quare, &c.

" *George* the Third, &c.
 " —To the sheriff of *M.*
 " greeting: We command
 " you, that you cause to be
 " levied of the goods and
 " chattels in your bailiwick
 " of *Richard Roe*, late of
 " *Westminster* in your coun-
 " ty, yeoman, 35*l.* 10*s.*

Ca. Sa.

" *George* the Third, &c.
 " —To the sheriff of *M.*
 " greeting: We command
 " you, that you take *Rich-*
 " ard *Roe*, late of *West-*
 " *minster* in your county,
 " yeoman, if he shall be
 " found in your bailiwick,
 " and safely keep him, so
 " that you may have his
 " body before us in eight
 " days of Saint Hilary,
 " wheresoever we shall then
 " be in *England*, to make
 " satisfaction to *John Doe*
 " for 35*l.* 10*s.*

" which were awarded to the said John in our court
 " before us, according to the form of the statute in such
 " case made and provided, for his damages, costs, and
 " charges which he sustained by occasion of the delay of
 " execution

“ execution of a certain judgment obtained by the said
 “ John against the said Richard, for 28*l.* 10*s.* in our
 “ court, before Sir *James Eyre* knight and his com-
 “ panions, our justices of the bench at *Westminster*, as by
 “ the record and proceedings thereof, which for cer-
 “ tain causes of error we lately caused to be brought
 “ into our said court before us, and now there re-
 “ maining, appears to us of record; and for that the
 “ said Richard afterwards, in our court before us, did
 “ not prosecute his said writ of error, as also appears to
 “ us of record:

“ And have you the said “ And have you there this
 “ monies before us in eight “ writ. Witness,” &c.
 “ days of Saint Hilary,
 “ wheresoever we shall
 “ then be in *England*, to
 “ render to the said John,
 “ for his damages, costs,
 “ and charges aforesaid,
 “ and this writ. Witness,”
 &c.

Writ of Restitution on the Reversal by K. B. of a
 Judgment given in C. B.

“ *George* the Third, &c.—To the sheriff of *M.* Writ of restitu-
 “ greeting: Whereas A. S. lately, that is to say, in tion.
 “ Trinity term in the 35th year of our reign, be-
 “ fore Sir *James Eyre* knight and his companions, our
 “ justices of the bench at *Westminster*, by our writ, and
 “ by the consideration of the said court, recovered
 “ against I. O. late of *Westminster*, yeoman, 100*l.*
 “ which in our said court of the bench were awarded
 “ to the said A. as well on account of the said I. not
 “ having performed certain promises and undertakings
 “ by the said I. made to the said A. as for her costs
 “ and charges which she had been put unto about her
 “ suit in that behalf, whereof he is convicted as by the
 “ record and proceedings thereof, which we lately
 “ caused to be brought into our court before us, for
 “ certain causes of error appears to us of record. And
 “ whereas we, by reason of divers errors in the said
 “ record and proceedings, and also in giving the said
 “ judgment, have reversed and totally annulled the
 “ same; it is therefore considered and adjudged in our
 “ said

“ said court before us, that the said I. be restored to all
 “ things which he hath lost by occasion of the said
 “ judgment. And for that the said A. sued out exe-
 “ cution upon the said judgment; and he the said I.
 “ was thereupon taken in execution for the same, and
 “ detained in prison until the payment was made to the
 “ said A. of the said 100*l.* Therefore we command
 “ you,

Fi. Fa.

“ that of the goods and
 “ chattels of the said A.
 “ in your bailiwick, you
 “ cause to be made and
 “ levied the said 100*l.*; and
 “ have you that money be-
 “ fore us on the morrow
 “ of the Holy Trinity,
 “ wheresoever we shall then
 “ be in *England*, to restore
 “ to the said I. the said
 “ money, awarded to him
 “ by our said court before
 “ us, upon the reversal of
 “ the said judgment; and
 “ have there this writ.
 “ Witness,” &c.

Ca. Sa.

“ that you take the said
 “ A. if she shall be found in
 “ your bailiwick, so that
 “ you may have her body
 “ before us on the morrow
 “ of the Holy Trinity,
 “ wheresoever we shall then
 “ be in *England*, to make
 “ satisfaction to the said I.
 “ O. for the said 100*l.* so
 “ awarded to him by our
 “ said court before us, upon
 “ the reversal of the said
 “ judgment; and have
 “ there this writ. Wit-
 “ nefs *Lloyd Lord Kenyon*,
 “ at *Westminster*, the 5th
 “ day of June in the 35th
 “ year of our reign.
 “ Mansfield and Way.”

The same forms of *testatum*'s and *non omittas*'s, which
 are used in common executions, may be added to any
 of these as occasion requires.

APPENDIX (X).

Form of Proceedings in false Judgment.

The Writ of *false Judgment* and Return into C. B.

“ **G**EOERGE the Third by the grace of God of *Great Britain, France, and Ireland* king, defender of the faith, and so forth. To the sheriff of *Berks*, greeting: If C. D. shall give you security that his suit shall be prosecuted then in your full county, cause the plaint to be recorded, which was in the same county without our writ between A. B. and the said C. of a certain plea of trespass on the case done to the said A. by the said C. as it is said, wherein the said C. complaineth that false judgment hath been given against him in the said county; and have you the same record before our justices at *Westminster*, from Easter in fifteen days under your seal, and the seal of four lawful knights of the same county, of such as shall be present at the said record, and summon by good summoners the said A. that he be then there to hear the said record; and have you there the names of the summoners and of the said four knights, and this writ. Witness ourself at *Westminster* the day of in the 36th year of our reign.”

Form of writ of,
false judgment.

By the Lord Chancellor of *Great Britain*, at the Instance of the Defendant.

“ By virtue of this writ to me directed in my full county held at *Abingdon* the 17th day of *March*, in the 36th year of the reign of our sovereign lord *George* the Third, by the grace of God of *Great Britain, France, and Ireland* king, defender of the faith, and so forth, I caused the plaint to be recorded, which is in the same court, without the writ of our said sovereign lord the king, between A. B. and C. D. in a certain plea of trespass on the case done to the said A. by the said C. as it is said, wherein the said C. complaineth, that false judgment hath been given

Return thereto.

“ given against him in the said county, which said
 “ plaint appears in a certain schedule to this writ an-
 “ nexed; and I have the said record before the justices
 “ within written, at the day and place within mentioned,
 “ under my seal, and the seals of four lawful knights of
 “ the same county, of such who were present at the
 “ said record; and I have prefixed the same day to the
 “ parties within written, that they might be there ready
 “ to proceed in the said plaint, as should be just accord-
 “ ing to the exigency of the said writ.

“ E. F. sheriff.”

The Form of the Schedule annexed to the Return :

Schedule an-
 nexed.

“ At the ninth county court of O. P. Esq. late sheriff
 “ of the county of *Berks*, held at *Abingdon* in and for
 “ the said county, the 18th day of October in the
 “ thirty-sixth year of the reign of our sovereign lord
 “ George the Third, by the grace of God of *Great*
 “ *Britain*, and so forth, and in the year of our Lord
 “ one thousand seven hundred and seventy-nine, before
 “ G. H., I. K., L. M., and others, free suitors of the
 “ said court, came A. B. in his proper person, and
 “ complained against C. D. of a plea of trespass on the
 “ case, &c. And he found pledges for prosecuting his
 “ said plaint, to wit, John Doe and Richard Roe; and
 “ puts in his place Thomas Smith his attorney, against
 “ the said C. of the said plea, and it is granted to him.
 “ And thereupon it is commanded to Thomas Wall,
 “ bailiff and minister of the said court, that he put by
 “ surety and safe pledges the said C. so that he may be at
 “ the next county court before the said suitors of the
 “ said court, at *Abingdon* aforesaid, to be held the 15th
 “ day of November in the thirty-sixth year aforesaid, to
 “ answer to the said A. of his said plea. The same day
 “ is given to the said A. here,” &c.

“ At the tenth county court of the said late sheriff
 “ O. P. Esq. held at *Abingdon*, in and for the said
 “ county, the 15th day of November in the thirty-
 “ sixth year of the reign of our sovereign lord George
 “ the Third, by the grace of God of *Great Britain*,
 “ *France*, and *Ireland* king, defender of the faith, &c.
 “ and in the year of our Lord one thousand seven hun-
 “ dred and ninety-five, before I. K., L. M., and others,
 “ free suitors of the said court, came the said A. by his
 “ attorney

" attorney aforesaid, and offered himself against the
 " said C. of his plea aforesaid: and the said Thomas
 " Wall, bailiff and minister of the said court, now cer-
 " tifies to the same court, and returns to the said court
 " here the said precept, to him in form aforesaid di-
 " rected, and that he had put by sureties and safe
 " pledges, to wit, John Denn and Richard Renn, the
 " said C. that he might be here at this day to answer
 " the said A. of the plea aforesaid, as it was commanded
 " to him; upon which the said C. being solemnly re-
 " quired, came here in his proper person to answer the
 " said A. of the plea aforesaid; and puts in his stead
 " Peter Blake, his attorney, against the said A. of
 " the plea aforesaid; and thereupon the said A. prays
 " a day to declare against the said C. in the said plea
 " here, until the next county court, to be held in and
 " for the said county at *Abingdon* aforesaid, to wit, the
 " 13th day of December, in the said thirty-sixth year of
 " the reign aforesaid; and it is granted to him, &c.
 " and the same day is given to the said C. here," &c.

" And at the eleventh county court of the said late
 " sheriff, held at *Abingdon* aforesaid, in and for the said
 " county, the thirteenth day of December in the
 " thirty-sixth year of the reign of our sovereign lord
 " George the Third, by the grace, &c. and in the year
 " of our Lord one thousand seven hundred and ninety-
 " five, before W. S., T. R., and others, free suitors of
 " the said court, came as well the said A. as the said
 " C. by their attorneys aforesaid; and hereupon the said
 " A. then declares in the said plea, in form following;
 " that is to say, the county court of the said county
 " of *Berks*, to wit, A. B. complains against C. D. of a
 " plea of trespass upon the case, and there are pledges
 " of prosecution, to wit, John Doe and Richard Roe.
 " And whereas the same A. B. by John Dixon his at-
 " torney, complains, that whereas the said C. D." (Here
 " insert the whole declaration.)

" And the said C. by Peter Blake his attorney, de-
 " fends the wrong and injury, when, &c. and prays
 " leave to imparl thereupon here until the next county
 " court, to be held in and for the said county at *Abing-*
 " *don* aforesaid, to wit, on the tenth day of January in
 " the said thirty-sixth year, and he hath it, &c. The
 " same

" same day is given to the said A. here, &c. And at
 " the twelfth county court of the said late sheriff, held
 " at *Abingdon*, in and for the said county, the tenth day
 " of January in the thirty-sixth year of the reign of our
 " sovereign lord George the Third, by the grace of
 " God, &c. and in the year of our Lord one thousand
 " seven hundred and ninety-six, before W. S., T. P.,
 " S. R., and others, free suitors of the said court, came,
 " as well the said A. as the said C. by their attornies
 " aforesaid; and thereupon the said C. as before, de-
 " fends the wrong and injury, when, &c. and says," &c.
 [Here insert the plea, &c. and replication, if it was
 at the same court; if not, then a continuance till
 issue was joined.] " And the said A. doth so likewise.
 " Therefore it is commanded to Thomas Wall, bailiff
 " and minister of the said court, that he cause to come
 " here at the next county court, to be held in and for
 " the said county at *Abingdon* aforesaid, to wit, on the
 " 7th day of February in the 36th year of the reign
 " aforesaid, twelve good and lawful men of *Abingdon*
 " aforesaid, and within the jurisdiction of the said court,
 " by whom the truth of the matter might be better
 " known, and who are neither of kin to the said A. nor
 " to the said C. to make a certain jury of the country,
 " between the parties of the said plea, because, as well
 " the said A. as the said C. between whom the contest
 " is, have put themselves upon that jury; the same day
 " is given by the said court here, as well to the said A.
 " as to the said C. here," &c.

" And at the thirteenth county court of the said
 " late sheriff, held at *Abingdon* aforesaid, in and for the
 " county aforesaid, the seventh day of February, in the
 " 36th year of the reign of our sovereign lord George
 " the Third, by the grace of God, &c. and in the year
 " of our Lord one thousand seven hundred and ninety-
 " six, before I. D., T. P., S. R., and others, free suitors of
 " the said court, come as well the said A. as the said C.
 " by their attornies aforesaid. And the said Thomas
 " Wall, bailiff and minister of the said court, returned
 " his said precept of *venire facias* to him in form afore-
 " said directed in all respects, served and executed.
 " And the said jury, in form aforesaid impanelled, be-
 " ing solemnly required, come, and twelve of them, to
 " wit, G. H., I. K., &c. &c. who, to speak the truth of
 " and

"and upon the premises above-mentioned, being
 "chosen, tried, and sworn, by the said court, there
 "upon their oaths say, that the said C. [*Here insert the*
 "*verdict*] and assess the damages of the said A. by oc-
 "casion of the said premises, besides his costs and
 "charges by him about his suit in this respect laid out
 "to 30 shillings, and for those costs and charges
 "6 pence. Therefore, it is considered by the said
 "court here, that the said A. should recover against the
 "said C. his said damages, costs and charges, to 30
 "shillings and 6 pence, assessed by the said jury, in
 "form aforesaid; and also 54 shillings and 2 pence
 "to the said A. at his request, by the said court here
 "adjudged, for his increased costs and charges; which
 "said costs and charges amount in the whole to
 "4*l.* 4*s.* 8*d.* and the said C. in mercy," &c.

"And at the first county court of me E. F. Esquire,
 "the present sheriff of the county of *Berks* aforesaid,
 "held at *Abingdon* in the same county, the 7th day of
 "March in the year aforesaid, before I. K., T. R., W. S.,
 "and O. M., four lawful knights of the same county, I
 "caused the said plaint, proceedings, and judgment,
 "between the parties aforesaid, to be recorded as the
 "writ hereunto annexed requires. In testimony where-
 "of, as well I the said sheriff, as the said I. K., T. R.,
 "W. S., and O. M., who were present at the said re-
 "cord, have caused our seals to be hereunto put, the
 "day and place last above-mentioned.

"E. F. Esq. sheriff."

Upon the return of the writ, the plaintiff in error must
 assign his errors in the following manner :

"And hereupon the said C. says, that *false judgment*
 "is given against him in the proceedings aforesaid, in
 "many instances; that is to say, in this, that in the said
 "declaration, the said record above specified, there is
 "not any positive allegation that the said A. doth
 "complain against the said C. for the said supposed
 "breach of promise in the said declaration specified,
 "but the same is only alleged by way of recital; and
 "also in this, that it doth not appear, &c." [*and so*
on reciting the errors as they appear on the record.]
 "And so the said C. says, that in the said court of the
 "said county, false judgment hath in divers instances
 "been

Assignment of
 errors thereon.

“ been given against the said C. in and upon the said
 “ plaint; and he prays that the said judgment, for the
 “ said defects, and for others in the said record appear-
 “ ing, may be reversed, annulled, and utterly made
 “ void, as being false and erroneous; and that the said
 “ C. may be restored to every thing which he has lost
 “ on occasion of the said judgment, and that the said
 “ justices here may proceed to the examination of the
 “ said premises.”

*The serjeant's or counsel's name
 who signs it.*

“ And the said A. B. says, that there is no error in
 “ the proceedings aforesaid, nor is any false judgment
 “ given against the said C. D. upon the said plaint men-
 “ tioned in the said record above specified; and he
 “ prays that the said justices here may proceed to the
 “ examination of the said record, and to the reformation
 “ and correction of the false judgment, if any such
 “ may be found, or appear to be given therein.” &c.

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